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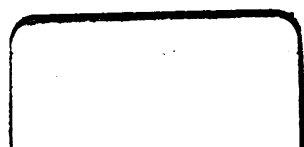
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A TREATISE
ON THE RULES AGAINST
Perpetuities, Restraints on
Alienation and Restraints
on Enjoyment

AS APPLICABLE TO GIFTS OF PROPERTY

IN

Pennsylvania

WITH A PARTICULAR DISCUSSION OF

SPENDTHRIFT TRUSTS

MARRIED WOMEN'S TRUSTS

ACCUMULATIONS

AND

GIFTS TO CHARITIES

BY

ROLAND R. FOULKE

Of the Philadelphia Bar

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P R E F A C E

It has been thought that there is need for text books dealing with the important topics of the law, but which are confined to the law of a single state. This need is particularly great in the older jurisdictions, such as Pennsylvania, which by this time have accumulated a sufficient volume of decided cases to furnish a respectable body of jurisprudence.

It is perhaps superfluous for any author who has written on the topics treated in the pages which follow, to acknowledge his indebtedness to the masterly treatises of Mr. Gray.¹ The difficulty, however, for the practitioner and the student in the use of these general treatises is, that they shed very little light upon the law of his own state. As the topics to be treated deal with the technical law of property and wills, detailed and exact information is more than ordinarily necessary. This book has been written with the object of supplying this need, so far as the law in Pennsylvania is concerned, which law is, on many of the points to be discussed, confused in the extreme. One of the reasons why the subject in hand has been considered so immensely difficult is because it has been commonly discussed in terms of the involved limitations of the older English cases. Those limitations are unlike anything to be met with in Pennsylvania to-day, and it seems useless to require a student to master the subtleties of an intricate rule by studying obsolete limitations, when he can achieve the same result by considering limitations which he will meet with in everyday practice. In order that the book may be useful to both the student and the practitioner, discussions of the law have been separated from statements of the law, so that the reader can avoid whichever appears to be unnecessary to the matter he has under investigation. An examination of the topic headings of the chapters will indicate the relative position of these discussions. This method of treatment has perhaps produced a diffuseness to which some

¹ Restraints on Alienation, 2 ed. (1895); Rule Against Perpetuities, 2 ed. (1906).

objection will be made. The author has, however, felt it better to err on that side than on the side of too much condensation. Some of the discussions of the cases are perhaps more lengthy than is usual in a text book. It is permissible, however, to introduce more detailed discussions in a work treating of the law of one state, in which the cases will assume a relatively greater individual importance.

An attempt has been made at an exhaustive citation of all cases from the beginning in the Supreme Court Reports. The lower court reports have not been so carefully examined. These cases, however, on the subject in hand, are of little value. They are generally very poorly reported, and it is difficult to determine their exact weight. For many of the duplicate citations the author is indebted to Pepper & Lewis's Digest of Decisions.

An appendix has been added, which brings the citations down to 224 Pa. 416, and 39 Super. Ct. 368.

ROLAND R. FOULKE.

Philadelphia, July 1, 1909.

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CHAPTER 1

INTRODUCTION

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Introductory Discussion

1. Our common law has always given to an owner of property an extensive power of imposing his will with respect to the property, on the party to whom he transfers it—a power which is sometimes called the power of dominion. This transfer of property may take place for a valuable consideration or by way of gift. When a consideration passes, and the purchaser subjects himself to the power of dominion of the transferor, the disadvantages which he has taken upon himself are supposed to be allowed for in the purchase price, and the validity or invalidity of the restrictions which may be imposed depend on principles of law other than those which will be discussed in this book. In the case of a transfer by way of gift, there has been a conflict between the tendency, on the one hand, to maintain and extend the power of dominion of the donor over his own property, and the principle, on the other hand, of public policy, which, for various reasons, restrains the exercise

of this power of dominion. It is to transfers by way of gift that our attention will be directed.

Cujus Est Dare, Ejus Est Disponere

2. In the discussions in the books on this subject, reference is frequently made to the maxim that a man may do as he will with his own. *Cujus est dare, ejus est disponere*. The proposition has been worded in some recent Pennsylvania cases¹ as follows: "A donor not under any obligation to give may give with such conditions as he pleases, subject only to the restriction that the conditions are not clearly illegal." This maxim, however, produces a confusion in thought when an attempt is made to apply it equally to both parties in the transaction. If the donor may do as he will with his own, then he may annex to the gift restrictions which will prevent the donee from doing what he will with what then becomes his own. Furthermore, the maxim is a self-evident proposition, and gives us no information on the most important question, which is this: what are the rules of law which limit the power of dominion? A man may do as he will with his own only when it is lawful, and whether it is lawful depends on whether the disposition conflicts with the rules of law which may be applicable to the transactions in question, and with the lawful restrictions imposed by the previous owner.

Two Fundamental Ideas Involved

3. It is the purpose of this book to discuss the rules of law which limit the power of dominion when exercised by a donor in making a gift of property. There are two conceptions involved, the acts which the owner may do by virtue of the power of dominion, and, the rules of law which limit the exercise of the power of dominion. Thus, it is a question of legal conception whether the donor may create an executory devise; it is a question of law aside from the conception of the power of dominion, whether he may create an executory devise to begin at any time in the future. The extent of the power of dominion is determined by one group of legal rules, and the exercise of that power is restrained by another group of legal rules.

¹ E. g., by Mitchell, C. J., in Holbrook's Est., 213 Pa. 93 at 94 (1905); by Elkin, J., in Spring's Est., 216 Pa. 529 at 533 (1907); see also Mitchell, C. J., in Dulles's Est., 218 Pa. 162 at 163 (1907).

Analysis of the Power of Dominion

4. The phrase power of dominion is rather loosely used in the books, and seems to do service for a number of different ideas. It may mean the power to impose restrictions on the donee at the time of the transfer. The right of transfer or alienation may be distinguished as a separate conception, as may also the power to use and enjoy the property. These two are, more properly speaking, incidents of ownership, and the question as to them, for our discussion, will be this: how far may the donor, in the exercise of the power of dominion, impose restrictions on the donee in the exercise of either of these incidents? The donor, in like manner, may split the property into different estates and interests at the time of the transfer. This we may call the power to create present and future estates. The *jus disponendi* may therefore be exercised to create present and future estates or to impose restrictions, and these restrictions may restrain alienation or they may restrain use and enjoyment. A few words as to each of these in their order will assist in the comprehension of the subject.

The Creation of Present and Future Estates

5. The donor of property may, according to the theory of our common law, divide his entire ownership into a number of different component parts or interests.² The estates which he may create and the manner of creating them are specifically regulated by the law; he can only avail himself of the formulas which the law provides. Anything else will be abortive, and no small part of the attention of the courts has been taken up in the attempt to fit the gifts of donors into one or another of the formulas. The power to create estates was limited originally by the doctrines of the feudal law. The formulas thus furnished did not meet the needs of the community, and, by one process or another, the power of creating estates was enlarged until a counter-check was required to keep this newly acquired power within the bounds consistent with the public policy of the community. This counter-check is the rule against perpetuities.

² The notion of "the simultaneous existence in different persons of separate rights of future and present enjoyment over the same subject matter, is probably peculiar to English law:" Digby, *Hist. Law Real Prop.*, 5 ed., p. 270 (1897.)

Right of Alienation

7. Alienation may be voluntary, which is by act of the owner, and may take place by transfer inter vivos, or by last will and testament, or involuntary, where the transfer takes place by an outside agency, generally by operation of law. Alienation in modern times is simple and easily understood. It is only necessary to notice, for the sake of historical completeness, that the various kinds of alienation have not always existed, and that there has been a difference between the development of alienability in the case of real property and its development in the case of personal property. Alienation is sometimes restrained by rules of law, and sometimes property is in its nature inalienable. These cases are of no importance in our discussion. We shall reach the principle, after the historical examination, that every man has a right to alienate all property which is in its nature alienable, and that all property is subject to involuntary alienation. The rule of law which forbids the donor to impose restraints restricting this right of alienation, is called the rule forbidding the creation of restraints on alienation. The development of this branch of the subject has been complicated by the circumstance that the right of alienation has not always existed. The law has had to evolve a legal conception of alienability and of the right to alienate, and the development of these two conceptions must be carefully distinguished from the right to impose restraints on alienation. There have been two processes here, (1) the development of alienability, (2) the diminution of the power to impose restraints on alienation.

Power of Use and Enjoyment

8. The power of use and enjoyment is perhaps the oldest incident of ownership. The legal conception of the power of use is limited almost solely by the nature of the property. Thus, a man cannot make the same use of his horse that he can of his land. The right to use and enjoy is restrained by the same rights which exist in other property holders; thus, a man is restrained by the principles of the common law and by numerous statutes, from, for instance, keeping dangerous explosives on his land or building beyond a certain height. The fundamental principle is that every man is entitled to the use and enjoyment of all property which is his, subject to the

rules of law which may prevail. With these rules we have no concern. An owner may, however, be restrained in his use by restrictions imposed by a previous owner. Such restrictions on gifts are not sanctioned by law and are against public policy. This principle of public policy is expressed in the rule of law forbidding the imposition of restraints on the use and enjoyment of property. The restraint may arise on a conveyance for value, a common instance of which will be found in the building restrictions which are frequently inserted in deeds of conveyance in modern times; or, on a transfer by way of gift. Our concern will be solely with the latter. Where there is a transfer for value, the validity or invalidity of the restrictions will be determined by different principles.

Scope of the Book

9. It is now possible to indicate the general plan and scope of the work: Part I will deal with such of the general rules of law relating to property and trusts as must be known in order to understand the application of the restraining rules of law, which will be discussed in the subsequent parts of the book. Part I, therefore, may be considered as a discussion of the extent of the power of dominion, and may be said to be a description of the matters to which the rules of law are to be applied. It has been found important to give this considerable attention, particularly with respect to the law of trusts. It is impossible to understand the application of any of these rules of law, unless the exact technical incidents and nature of the matters to which they are to be applied are thoroughly apprehended. Part II will contain a discussion of the application of the rule forbidding restraints on alienation. In Part III we will consider the operation of the rule against perpetuities. In Part IV we will take up the rule forbidding restraints on enjoyment, and Part V will be devoted to the several special topics of married women's trusts, accumulations and charitable gifts.³

Reasons for the Existence of the Restraining Rules to be Discussed

10. Before proceeding with the treatise proper, it is in order to ascertain, if possible, the reason why the law has

³ Spendthrift trusts are discussed in Part II, Chapter 13.

by several rules diminished the dominion which the owner of property may exercise when he makes a disposition thereof, or as expressed in the concrete form suggested by the rules of law which have been evolved to restrict that dominion. Why is it that future estates cannot be created to begin at any time in the future? Why is it that the donor may not impose restraints on alienation and on the use and enjoyment of property?

Principle of Public Policy Generally Suggested

11. It has been suggested that the principle of public policy is aimed to prevent the tying up of property and the taking of it out of commerce.⁴ Mr. Gray points out that this reason loses its force in the face of the modern statutes giving trustees full power to make changes in investments and sales of trust property,⁵ an observation which would not apply to limitations at law where there are no trustees. Furthermore, even if the trustees can sell, the subject matter of the trust remains tied up. The principle that all property shall be in circulation is clear enough. The other branch—the prevention of the tying up of property—does not tell us why property should not be tied up, unless it be understood that the reason is that property is thereby taken out of commerce. There is, however, another reason.

Reason Suggested by the Author

12. Property which is tied up may be thereby kept in the enjoyment of an individual who does not possess the self-restraint and ability which he must have to keep the property if he has absolute control. He is, therefore, maintained in a position of superiority over his fellowmen by the artificial advantages of inherited wealth. This is a surviving relic of aristocratic and feudal institutions and is contrary to the public policy of a democracy. An aristocracy is a good thing in its way, but is only compatible with the public policy of a free democratic community when it must sustain itself by the force of the individual superiority and ability of its members, and not on prerogative or on the accumulations of the dead. Whatever, therefore, tends to keep people beyond the

⁴ Gray, *Rule Perp.*, 2 ed. (1906), §603a.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §603a.

reach of want, without the responsibilities of caring for wealth or the necessity of work, is contrary to this principle of public policy for two reasons: first, it produces an artificial inequality, and second, it deteriorates the character of the person provided for, and if there are many such, the general quality of the race will be lowered. There is no objection to an individual receiving a large fortune by way of gift, provided he has unfettered control of it. If he has the sense to keep the property, he can and probably will make proper use of it, and is not an undesirable member of the community. Reasonable opportunity must be afforded, on the one hand, for the gratification of natural affection and the desire to provide for offspring, but on the other hand, the door must be closed on the undue gratification of the wish, common to most parents of wealth, to preserve their descendants in an advantageous position without the danger of falling therefrom through incompetence and folly.

Reason for Exception as to a Charity

13. A charitable gift is not within the public policy sustaining these rules, because money devoted to charity does not produce any of the evils mentioned in the last section. Consequently where a charitable gift cannot be sustained within reasonable limits without violating the restraining rules of law,⁶ an exception will be allowed.⁷ That this is the underlying thought of a charitable gift, is shown by the persistence with which the motive of the donor is dwelt upon in the attempt to define it. The motive need not be altruistic, but the object of the gift must be, and while, therefore, it is fair to assume that in such case the motive also is charitable, such assumption is unnecessary.

Mr. Gray's Reason

14. Mr. Gray suggests that when ownership of property is in danger of being lost by a future contingency, the property is not likely to be used with the same energy and interest as it would were the contingency absent.⁸ This reason goes to

⁶ The rule against perpetuities; the rule forbidding restraints on alienation; and the rule forbidding restraints on use and enjoyment.

⁷ For the exact application of the rules, see Chap. 26 on Charitable Gifts.

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §603f.

the rule against perpetuities and has force, but does not explain, as Mr. Gray observes, the exception as to a charitable gift. Furthermore, the more remote the contingency, the more energy in the present use, as the probability of losing the property will be less present to the mind. A man who is going to lose his property in ninety-five or one hundred and fifty years is not likely to bother himself much about that remote contingency, whereas if he may lose it in three or five years, his attitude towards the use of the property will be radically different. It is apprehended, therefore, that the reason suggested by Mr. Gray is not a sufficient explanation either of the rule or the exception in the case of a gift to a charity.

The Application of the Principle of Public Policy

15. The expression of this principle of public policy in the rule forbidding restraints on alienation and the rule forbidding restraints on use and enjoyment, is clear. It is plainly the effect of such restrictions to prevent the free circulation of property and to protect the holder from the consequences of his own lack of discretion. The application of the rule against perpetuities is not so clear. It is this: if the donor can create interests to begin at indefinite times in the future, he can create a succession of life estates in his descendants, which will result in keeping the property in his family to the remotest generation, and in restraining the dominion of each successive owner to his life only, and it is this very kind of a settlement that it is the purpose of this principle of public policy to prevent.⁹ The principles relating to restrictions on involuntary alienation are somewhat different, and are discussed at another point.¹⁰

⁹ For further discussion of the object of the rule against perpetuities, see §§332-333.

¹⁰ See §§252-254.

PART I

PROPERTY

COMMON LAW

REAL PROPERTY

Chap. 2. Alienability. Modified Fees.

Chap. 3. Future Legal Interests.

PERSONAL PROPERTY

Chap. 4. Alienability. Future Legal Interests.

EQUITY

Chap. 5. Uses and Trusts before the Statute of 27, Henry VIII.

Chap. 6. The Statute of Uses.

Chap. 7. Trusts.

CHAPTER 2

ALIENABILITY MODIFIED FEES

ALIENABILITY

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MODIFIED FEES

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Alienability of Land in Feudal Times

18. Two theories have been entertained as to the alienability of land at the early common law. The first theory is that land was alienable, and that restrictions on that alienability gradually grew up.¹ The other, that land was inalienable, and that powers of alienation were subsequently acquired from time to time.² The latest authority on the subject says that we cannot start from absolute alienability or absolute inalienability, but from a state of affairs in which the lord

¹ This was the view held by Coke, 2nd Inst., 65; Coke, Lit., 43a.

² This was the view held by Blackstone, Com. II, 71, 72.

could prevent any alienation by his tenant which was detrimental to his interests.³

Conflicting Interests as to Alienability

19. Each tenant in the feudal ladder would be subject to conflicting considerations of self-interest in his attitude towards the development of alienability. In so far as his feudal superior was concerned, he would wish to have full power of alienation, and when he in turn came to grant to a feudal inferior, he would wish to impose as much inalienability as possible. The same conflict appears in modern times. The owner of property, when he is a donor, wishes to have his power of dominion increased. When he is a donee, his interest is the other way. It will thus appear that the development of the notion of alienability has been a very complex process.

Development of Alienability

20. Whatever the feudal theory was, real property was gradually made alienable and liable for debts,⁴ and inalienability is the exception in modern times. In Pennsylvania, land and rights in land have from the first been freely alienable and liable for the debts of the owner.⁵ There is, therefore, no occasion for us to consider, in a treatise on Pennsylvania law, any of the conflicting steps which have entered into the development of the theory of alienability. The only ancient theory which persists in Pennsylvania today, in so far as this

³ "We cannot hold that the free alienability of the fee simple is the starting point of English law. We must be content with a laxer principle, with some such idea as this: that the tenant may lawfully do anything that does not seriously damage the interests of his lord. He may make reasonable gifts but not unreasonable. The reasonableness of the gift would perhaps be a matter for the lord's court. A tenant would be entitled to the judgment of his peers." Pollock & Maitland, *Hist. of Eng. Law*, Vol. I, 1 ed., p. 324, 2 ed., p. 343. It is to be observed that alienability in feudal times was conceived of as an actual delivery

of the land itself. The notion of the transfer of rights in land was of much later growth. The transfer, furthermore, might be by way of settlement or for services to be rendered, and we thus observe the same distinction in those days as we have now between the case of a gift without consideration and a transfer for value. The attitude of the lord and his tenant would be different in the case of each kind of a transfer.

⁴ The various English statutes and decisions are referred to by Mr. Gray, *Restraints on Alien.*, 2 ed. (1895), §4.

⁵ Mitchell, *Real Est. & Conv. in Penna.* (1890), pp. 352, 487.

subject is concerned, is the conception of the power of dominion. The question for our consideration in this connection is this: how far may the donor in the exercise of his power of dominion take away the quality of alienability, voluntary or involuntary, with respect to the property which he gives to the donee?

MODIFIED FEES

Preliminary

21. The estate in fee simple presents no difficulty, so far as the matter in hand is concerned. A number of variations of this estate have occurred which are of some importance. These have been classified⁶ as modified fees, and are as follows: (1) conditional fees, (2) estates tail, (3) base fees, (4) qualified fees, and (5) determinable fees. They will be discussed in this order.

Conditional Fees

22. A conditional fee was where the inheritance was restricted to the heirs of the body of the donee. It was said that he took the estate subject to the condition that he have the heirs.⁷ By the construction adopted by the judges, the fee was alienable if the donee has heritable issue born, but if no alienation was made it descended to the issue named. Down to the end of the twelfth century, however, the tenant in fee very commonly had to seek the consent of his heirs before making a conveyance. This restriction disappeared in the next century.⁸ The construction put upon these gifts interfered with the plans of the aristocracy, who had sought by this means to settle their estates so that they would remain in their families. They obtained the passage of the Statute De Donis, which modified the conditional fee, and which will be referred to in the next section.

⁶ Challis, *Real Prop.*, 2 ed. (1892), p. 52. Mr. Challis seems to have been the first writer to accurately distinguish the modifications of the fee.

⁷ Challis, *Real Prop.*, 2 ed. (1892), Chap. 18, p. 224; Pollock & Maitland's *Hist. Eng. Law*, Vol. 2., 1 ed., p. 14,

and 2 ed., p. 19; 2 *Law Quar. Rev.*, 276 (1886); Gray, *Rule Perp.*, 2 ed. (1906), §14, n. 3. The conditional fee was the first attempt at a settlement: Lewis, *Perp.*, (1843), pp. 28, 29.

⁸ Pollock & Maitland's *Hist. Eng. Law*, 1 ed. and 2 ed., Vol. 2, p. 13.

Estates Tail

23. Conditional fees were turned into estates tail by the provisions of the Statute De Donis.⁹ The statute in effect provided that the estate should descend as specified in the gift. An estate tail was, therefore, a fee simple conditional modified by the Statute De Donis.¹⁰ No conditional fee, therefore, has been created since the thirteenth century: hence, the term conditional fee is entirely out of place in describing any limitation in modern times.¹ The estate tail continued in the descent designated, it could not be aliened by the tenant in tail, and the remainders limited after it were indestructible. This state of affairs did not long continue. By various decisions of the courts, and with the help of several statutes, the estate tail became alienable, and the reversions and remainders limited after it became destructible.² A tenant in tail was permitted, by a cumbersome process known as a common recovery, to turn his estate tail into a fee,³ and bar the issue in tail and remainders. The Statute De Donis is in force in Pennsylvania.⁴ No conditional fee, therefore, has ever existed in Pennsylvania, and estates tail were introduced into Pennsylvania as part of the common law, and were barrable by a common recovery.⁵ Common recoveries fell into disuse after the Act of January 16, 1799,⁶ which provided that an entailed estate could be barred by deed duly recorded.⁷ By the Act of April 27, 1855,⁸ it was provided that any gift, conveyance or devise which, under existing laws, would create an estate tail, should be construed to create an estate in fee. Since this Act, estates tail have ceased to be of practical importance

⁹ 13 Edward I., C. 1. (1285) commonly known as the Statute of Westmin. II.

¹⁰ Challis, *Real Prop.*, 2 ed. (1892), Chap. 20, p. 259.

¹ The phrase, however, is occasionally misused by the judges: see §§28, 29.

² Gray, *Rule Perp.*, 2 ed. (1906), §19.

³ For discussion of a common recovery, see Lewis, *Perp.*, (1843), Chap. III, "of the unfettering of entails;" Mitchell, *Real Est. & Convey. in Pa.* (1890), p. 109, n.

⁴ Report of the Judges, 3 Binney, 595 at 603 (1808).

⁵ Act of Jan. 27, 1750; 1 Smith's

Laws, 203, §1; *Dunwoodie v. Reed*, 3 S. & R. 438 (1817).

⁶ 3 Smith's Laws, 338, §1.

⁷ For an instance of such a deed, see *Eichelberger v. Barnitz*, 9 Watts, 447 (1840), and for a recent case of a deed barring an old entailed estate, see *Cochran v. Cochran*, 127 Pa. 486 (1889).

⁸ P. L. 368, §1; see Pepper & Lewis's Digest, title "Estates Tail," Vol. 1, Col. 1877, et seq. A judicial sale of an estate tail or a decree in partition will operate as a common recovery under the Act of April 15, 1859, P. L. 670, §1. See *Curtis v. Longstreth*, 44 Pa. 297 (1863).

in Pennsylvania.⁹ The Act in turning the estate tail into a fee, does not displace the remainder, which may be limited thereon. It can take effect as an executory devise.¹⁰

Act of 1855 Misunderstood by the Supreme Court

24. There were two cases which might arise at common law: (1) where there was a gift of a life estate followed by words importing an indefinite failure of issue, which sometimes had the effect of enlarging the life estate to an estate tail; (2) the gift of a fee followed by words importing an indefinite failure of issue, which sometimes had the effect of reducing the fee to an estate tail. Where the words imported a definite failure of issue within a life in being, the life estate was not enlarged and the fee not reduced.¹ Yet in *Nicholson v. Bettie*,² where there was a gift of a fee with words which were construed to import a limitation over on a definite failure of issue in the first taker, Strong, J., in the Supreme Court, seemed to think it necessary to apply the Act of 1855, and to say that the supposed estate tail was turned into a fee simple. At common law, without the Act, the result would have been the same, as there was no fee tail at all. The ultimate limitation was valid as an executory devise, because being limited after the definite failure of issue at the death of the first taker of the fee, it must take effect within the period prescribed by the rule against perpetuities.³

Base Fee

25. A base fee is a fee descendible to the heirs general upon which subsists a remainder or reversion in fee simple.

⁹ The Act does not apply to estates tail created by the will of a testator dying before the passage of the Act, but does apply to an estate created by will dated before the Act, where the testator has died after the Act; *Reinhart v. Lantz*, 37 Pa. 488 (1860). For other cases of estates tail created before the Act, see *Price v. Taylor*, 28 Pa. 95 (1857); *Morris v. Fisher*, 8 D. R. 161 (1899); *Kinsel v. Ramey*, 87 Pa. 248 (1878); *Titsell v. Cochran*, 7 Sad. Cases, 15 (1887). An estate tail descends in Pennsylvania as at common law; *Guthrie's App.*, 37 Pa. 9 (1860), appa-

rently overruling some earlier cases to the contrary.

¹⁰ *Nicholson v. Bettie*, 57 Pa. 384 (1868). The remarks of the court in this case, that the Act of 1855 remits us to the common law before the Statute De Donis, seem to be open to objection. If it did, the grantee could not alienate before he had heritable issue born, and nobody ever contended that such was the law in Pennsylvania.

¹ *Lewis, Perp.*, (1843), pp. 187, 188.

² 57 Pa. 384 (1868).

³ See §336, post, as to gift on death without issue.

As no fee descendible to the heirs general which arises by mere limitation can have subsisting upon it any remainder or reversion, a base fee can only arise by the conversion of a fee tail into a fee descendible to the heirs general by some method which does not destroy the remainder or reversion properly subsisting on the fee tail.⁴ A base fee cannot exist in Pennsylvania today except by a conveyance by the tenant of an old estate tail. It seems that under the decision in *Nicholson v. Bettie*,⁵ the Act of April 27, 1855,⁶ does not have the effect of turning an estate tail into a base fee. No case of a base fee has been found in Pennsylvania, and it is not likely that such a case has ever existed. The term base fee has been improperly used.⁷

Qualified Fee

26. A qualified fee simple was a fee limited to a man and the heirs of any ancestor in the paternal line whose heir he was.⁸ Mr. Challis⁹ says that the rare occurrence of this species of estate, if it ever has actually occurred, has prevented it from receiving much notice. It is not worth while, therefore, to spend much time on so hypothetical a subject. The phrase qualified fee has, however, been used inaccurately in Pennsylvania.¹⁰ It has been said¹¹ that in the case where the court recognizes the validity of an executory devise, there is a qualified fee simple, as it is the very essence of such an executory devise to reduce the estate upon which it is limited from an absolute fee simple to a qualified fee simple. The notion is without weight. There is nothing in the definition or idea of a qualified fee simple to sustain the remark. Furthermore, as

⁴ Challis, *Real Prop.*, 2 ed. (1892), Chap. 22, p. 297.

⁵ 57 Pa. 384 (1868), see §24, ante.

⁶ P. L. 368, §1, see §23, ante.

⁷ See *Siegel v. Lauer*, 148 Pa. 236 (1892). Reporter in the head line to the syllabus in *Evangelical Luth. Church v. Township*, 35 Pa. C. C. 348 (1908); there is nothing in the opinion of the court to sustain this notion of the reporter.

⁸ Challis, *Real Prop.*, 2 ed. (1892), p. 241.

⁹ Challis, *Real Prop.*, 2 ed. (1892), p. 244.

¹⁰ See §28, post.

¹¹ Mr. Edward Brooks, Jr., 32 *Amer. Law Reg.*, N. S. 1044 (1893); Mr. Henry Budd in note to 2 *Sharswood & Budd's Leading Cases*, 482; per Master in the court below in *Fisher v. Wister*, 154 Pa. 65 at 71 (1893); called a conditional fee by Woodward, P. J., in the court below in *Barnet v. Deturk*, 43 Pa. 92 at 94 (1862); Gordon, J., in *Went's App.*, 106 Pa. 301 at 308, 309 (1884).

one of the well admitted peculiarities of the executory devise lies in the circumstance that it can take effect after an absolute fee simple, there seems to be some confusion in thought in saying that the effect of the executory devise is to reduce the quantum of the fee.¹ An executory devise operates to transfer or defeat the fee, not to reduce or qualify it.

Determinable Fee

27. A determinable fee is where a fee simple estate is limited to the grantee and his heirs until the happening of some future event which may never happen at all.² It is clear that the time of the termination of the estate must be uncertain. A limitation to a grantee and his heirs until the happening of an event which is sure to happen, does not create a fee simple at all.³ A learned writer⁴ divides determinable fees into two classes: (1) where the fee is to last until a specified contingency shall happen, the contingency being such that it may never happen; (2) where the estate is to last so long as an existing state of things shall endure, the state of affairs being such that it may endure forever. Determinable fees may be created in Pennsylvania. A list of the determinable fees which have arisen in Pennsylvania is given in the note.⁵ Mr. Gray says that determinable fees are invalid

¹ See Gray, *Rule Perp.*, 2 ed. (1906), §32.

² Challis, *Real Prop.*, 2 ed., Chap. 17, p. 224.

³ The language, therefore, of the reporter in the first paragraph of the syllabus in *Methodist Church v. Public Grounds Co.*, 103 Pa. 603 (1883), in which he speaks of a *determinate* fee is clearly incorrect and unsupported by any respectable authority. For a proper use of the word, see Pollock & Maitland, *History of English Law*, Vol. 2, 1 and 2 ed., p. 111. The word *determinate* means fixed, certain.

⁴ Challis, *Real Prop.*, 2 ed. (1892), p. 225.

⁵ Conveyance of a certain mill dam and pond of water &c., "to and for the use and service of a certain mill with the land

thereto belonging, and for no other use whatsoever." *Scheets v. Fitzwater*, 5 Pa. 126 (1847). Grant in fee for "the use and purpose of a certain railroad and no other use whatsoever." *Penna. R. R. Co. v. Parke*, 42 Pa. 31 (1862). "For the use of a certain church and no longer and then to revert back." *Henderson v. Hunter*, 59 Pa. 335 (1868). See *Gumbert's App.*, 110 Pa. 496 (1885) and *Saxton v. Mitchell*, 78 Pa. 479 (1875). See also remarks of Rogers, J., in *Union Canal Co. v. Young*, 1 Whart., 410 at 427, 428, (1836), and *Kerlin v. Campbell*, 15 Pa. 500 at 506 (1851). Grant to a school-board provided that "in case the school law now in existence should be abolished and the public school should cease to exist," the land should revert: *Courtney v. Keller*, 4 Penny. 38 (1884). Grant to

in England since the passage of the Statute of Quia Emptores.⁶ Mr. Challis⁷ reaches a contrary conclusion.⁸ The tenant of the determinable fee may alienate or will his estate, and it will descend to his heirs, subject in all these cases to be determined by the qualifications annexed to the grant.⁹

Confusion in Terminology as to Modified Fees in Pennsylvania

28. While the distinction between these different kinds of fees is clear and easily understood, the language of the judges in Pennsylvania has been loose and inaccurate.¹⁰ It is to be observed, however, that the language of the older text writers

county commissioners of a tract of land adjoining the county jail "for an open yard," so that the same "be and remain forever hereafter unbuilt on, in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the same wall:" *Slegel v. Lauer*, 148 Pa. 236 (1892). A devise by a testator to his wife "and her heirs and assigns forever so long as she remains my widow," creates a determinable fee, erroneously called a conditional estate: *Scott v. Murray*, 218 Pa. 186 (1907): case arose on a question over the title derived from the widow who died without having remarried. This case does not sustain the validity of the clause, upon which latter point there is probably some doubt. Grant to a railroad company "so long as" the grantee "shall use and occupy the same as a passenger depot and offices:" *Young v. Oviatt*, 35 Super. Ct. 603 (1908). The case put by Mr. Challis, *Real Prop.*, 2 ed. (1892), p. 230, "till the marriage of a person shall take place," is probably used in practice in Pennsylvania, but has not come before the court.

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §32.

⁷ Challis, *Real Prop.*, 2 ed. (1892), Appendix IV, p. 398

⁸ For list of English determinable fees, see Challis, *Real Prop.*, 2 ed. (1892), p. 228, et seq. See also Mr. Preston's list quoted in Mitchell, *Real Est. & Conv. in Pa.* (1890), at p. 100.

⁹ The question as to how far courtesy and dower are incident to determinable fees, does not seem to have arisen in Pennsylvania. For a discussion of the question, see Gray, *Rule Perp.*, 2 ed. (1906), §14, n. 3.

¹⁰ Determinable fee called a qualified fee by Krause, P. J., in the court below, in *Scheetz v. Fitzwater*, 5 Pa. 126 at 128 (1847), and a base fee by the reporter in the second paragraph of the syllabus. Determinable fee called a base or qualified fee, it could not be either of these, by Endlich, J., in the court below, in *Slegel v. Lauer*, 148 Pa. 236 at 241 (1892). See also language of Mercur, J., in *Methodist Church v. Public Grounds Co.*, 103 Pa. 608 at 615 (1883); Rogers J., in *Union Canal Co. v. Young*, 1 Whart. 410 at 427-428 (1836); Kerlin v. Campbell, 15 Pa. 500, per curiam opinion at 506 (1851). Determinable fee called a conditional estate by Bouton, P. J., in the court below, in *Young v. Oviatt*, 35 Super. Ct. 603 at 605 (1908), and a base fee by the reporter in the syllabus of the same case.

on the subject is just as confusing.¹¹ The Supreme Court, if the case should come before it again, can do no better than follow the accurate distinctions pointed out by Mr. Challis.

Title Acquired in Eminent Domain

29. The title acquired by a railroad company under condemnation proceedings in eminent domain, was called a base or conditional fee by Mitchell, J., in *Railroad Co. v. Paper Mills Co.*¹ It is true that the land does revert to the former owner when the use ceases.² This reversion appears to exist under the statutes relating to eminent domain, and does not arise out of a grant.³ The application of the technical term of the common law to the case, seems to be somewhat confusing. If the estate is to have any such name, the phrase determinable fee is the only one which seems possible. The application of the term base or conditional fee seems very questionable.

Summary as to Modified Fees

30. It will thus appear that an attempt was made at the early common law to tie up property by creating inalienable conditional fees. This device was rendered useless by the decision of the judges.⁴ Recourse was then had to the legislature, and the conditional fee was turned into an estate tail. The evil results of this estate were soon removed by the decisions of the courts, and the estate itself was abolished in Pennsylvania in 1855.⁵ The base fee seems to be a necessary evolution of the estate tail, and to fall with it.⁶ A

¹¹ The confusion in the language of Kent and Blackstone is pointed out by Mr. J. M. Zane in an article in 17 Harv. Law Rev., 297 at 300 (1904), and the confusing language of Lord Coke is pointed out in Challis, Real Prop., 2 ed. (1892), pp. 52, 53.

¹ 149 Pa. 18 at 20 (1892), quoted by Paxson, C. J., in *Rwy. Co. v. Peet*, 152 Pa. 488 at 492 (1893), and McCarthy, J., in *Spesse v. Railroad Co.*, 23 Pa. C. C. 17 at 19 (1899). The same remark has been applied to the title acquired by a municipal corporation under emi-

nent domain; see Sterrett, C. J., in *Reading v. Davis*, 153 Pa. 360 at 365 (1893); Green, J., in *Phila. v. Ward*, 174 Pa. 45 at 49 (1896).

² See *Lance's App.*, 55 Pa. 16 (1867).

³ A determinable fee may exist where the owner of the property makes a grant to the railroad company, for a case of which see *Railroad Co. v. Parke*, 42 Pa. 31 (1862); *Young v. Oviatt*, 35 Super. Ct. 603 (1908).

⁴ See §22, ante.

⁵ See §23, ante.

⁶ See §25, ante.

qualified fee has probably never existed in Pennsylvania, and furnishes a fit topic only for academic discussion.⁷ The determinable fee still remains in Pennsylvania and is freely alienable.⁸ The only objection to the determinable fee lies in the circumstance that the possibility of reverter may take effect at a period beyond that prescribed by the rule against perpetuities.⁹

⁷ See §26, ante.

⁹ As to this point see §368, post.

⁸ See §27, ante.

CHAPTER 3

FUTURE LEGAL INTERESTS IN REAL PROPERTY

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Definition of a Future Interest

35. The logical conception of a future interest is that of an interest which is to arise at some time in the future as distinguished from an interest which exists at the present time, and the conception admits of a distinction between those interests which are certain to arise, and those which are uncertain to arise. Remainders were the only future interests in real property which were known to the common law. They did not, however, owing to certain doctrines of the early common law, square with the logical conception of a future interest. The common law forced them into a technical and artificial mold which has remained until this day. To understand this matter, it will be necessary to trace the origin of remainders and point out the doctrines which governed their creation at the early common law.¹

Early Common Law Theory of Future Interests

36. The feudal law appears to have evolved no conception of a future interest. All ownership in land, whatever its nature, was present ownership or holding. All grants of land were grants for life, and when the heirs were added the notion was that the heirs of the grantee took by substitution in his place and not by way of succession.

Reversion

37. A reversion was the estate or interest which was left in the feoffor after he made the grant for life.² The land, as it was said, came back to the feoffor after the termination of the life estate. The reversion always arose by implication of law on a grant *inter vivos*, and consequently could

¹ The nature of future interests has been the subject of considerable recent discussion: see article by Mr. Kales, "Several Problems of Gray's Rule Against Perpetuities, Second Edition," 20 Harv. Law Rev., 192 (1907); "Future Interests in Land," 22 Law Quar. Rev., 250, 383 (1906), and criticism thereon in 20 Harv. Law Rev., 243 (1907); Article "Future Interests in Land" by Edward Jenks, 20 Law Quar. Rev.,

280 (1904); Article of Mr. Kales, 24 Law Quar. Rev., 301, 305.

² Challis, Real Property, 2 ed. (1892), p. 68. Not the same as the reversion existing after a term of years: Challis, *ubi supra*, p. 70. The relation existing between landlord and tenant, is not feudal. This distinction is not taken in Pennsylvania, and seems unnecessary for practical purposes in modern law.

not be created by deed. It has always been considered as having all the incidents of a fee, being devisable, assignable and heritable. Reversions exist in Pennsylvania today and are governed by the same rule as at common law. Grants for life are rare in modern times, and reversions, therefore, are of infrequent occurrence. In the case of a will, where there is a gift of a definite estate with a residuary clause, the residuary gift will be a reversion.³ A reversion is devisable, and there seems to be no objection to permitting it to be devised by the same will upon which it arises. In the similar case of a deed, the grant of the purported reversion is a disposition of the balance of the fee, and must take effect as a remainder. This point, perhaps, is not of much practical importance.

Origin of Vested Remainders

38. It was therefore said that when the feoffor limited an estate in another person after the life estate, he directed where the land should remain after that termination instead of coming back to him.⁴ This interest was consequently called a remainder. It was the interest substituted for the reversion. The first life estate created by the feoffment was called the particular estate;⁵ and the estates limited thereafter, whether for life, in tail, or in fee, were called the remainders. When the particular estate and remainders together made up the fee, there could be nothing else limited thereafter.⁶ There could not be a remainder after a fee. There are certain peculiar characteristics of a vested remainder which can only be understood by considering the common law doctrine relating to seisin.

Seisin

39. Seisin meant possession, and was an always existing fact. The land was immovable, and consequently seisin could

³ Houston, J., in *McCay v. Hughes*, 6 Watts, 345 at 348 (1837); Kennedy, J., in *Brown v. Boyd*, 9 W. & S. 123 at 128 (1845); Lowrie, J., in *Leah Passmore's Administrators' App.*, 23 Pa. 381 at 382 (1854); Gray, Rule Perp., 2 ed. (1906), §113a.

⁴ Pollock & Maitland, *Hist. of English Law*, Vol. 2, 1 ed. and 2 ed., p. 21.

⁵ Mr. Lewis, *Lewis, Perp.*, p. 410,

(1843), says that he is unable to find any authority for the opinion that the particular estate meant first estate limited. Mr. Gray, *Rule Perp.*, 2 ed. (1906), §8, says that the first life estate is called the particular estate.

⁶ When the whole fee was limited, but there was a possibility that it might not last forever, there was said to be a possibility of reverter. See §72, post.

be acquired only by coming into a certain relation with the land, and could be gotten rid of only by a corresponding exit from that relation. A chattel could be thrown away and the possession lost. In the case of land, the owner could get rid of the seisin only by transfer to another, death, or disseisin. He could not bury the seisin in the ground or hang it on a tree. He could, therefore, do no act by which the seisin would be in abeyance, not because of any principle of the feudal law, but because the nature of the seisin itself did not admit of any such disposition.⁷ The doctrines relating to seisin, while they existed in feudal times, are not necessarily feudal. The feudal system could just as well have existed as it did with some other theory of possession in force. The theory adopted was, more properly speaking, a fundamental legal conception which was entertained by the lawyers at that time, and which worked its way into the feudal system. When a feoffment was made, according to the common law, the feoffor distributed the seisin, or such part of it as he chose to dispose of, among the feoffees designated, and the whole seisin or possession was conceived of as existing at any particular moment of time parceled out among the various owners. It necessarily followed that no one could be a grantee or take any part of the ownership unless he was present at the time of the feoffment and had part of the seisin or possession delivered to him. The remainderman was one of the feoffees.

Characteristics of a Vested Remainder

40. A vested remainder, therefore, was always limited directly and immediately to a specified person, and could not be subject to a condition precedent. If there was a condition precedent, the seisin could not be immediately disposed of. For the same reason, a remainder could not be limited to begin in futuro. It is also to be noted, although the explanation is somewhat different, that a remainder was a freehold estate, and could only be limited after a freehold estate; or, as it is said, must be supported by a freehold estate. These principles of the com-

⁷ The reason ascribed in modern times, that there must always be some one to render the services due the lord of the fee, does not, it is believed, touch the real root of the matter. This reason is further weakened when it is remembered

that each lord could distrain directly on the occupant of the land for the services due him, and no arrangement or hiatus in the feudal chain below him could affect his right.

mon law have survived to modern times, and a vested remainder has today the same characteristics as it had in the thirteenth century. The common statement is that the remainder is limited to take effect immediately upon the termination of the preceding particular estate. While this is, perhaps, an accurate description of the language used, it puts the matter more clearly to say that the remainder is directly limited subject to the preceding particular estate.

Vested Remainder a Quasi Future Interest

41. A vested remainder is, in fact, a future interest, because a remainderman does not have the use and enjoyment of the property until the termination of the preceding particular estate. It is in theory a present interest, for reasons which have already been discussed. It is vested in interest, but the enjoyment is postponed. It may with propriety be called a quasi future interest. The peculiarity of a vested remainder lies in the circumstance that it may vest in interest before it vests in possession, while other future interests vest in interest and possession simultaneously. The latter are true future estates. The vested remainder is a relic of the struggle to evolve the theory of a future interest out of the hard and fast doctrines of the early common law.

Definition of a Vested Remainder

42. A vested remainder, therefore, may be defined as a freehold interest in real estate directly limited to an ascertained person, subject to a prior estate or estates of freehold less than a fee, created by the same instrument in the same property.⁸ Since estates tail are obsolete in Pennsylvania, we may for the purposes of Pennsylvania law, reduce the definition to its lowest terms, and say that a vested remainder is an estate for life or in fee in real property, directly limited to an

⁸ "A remainder is an estate limited to commence after the determination of a particular estate previously limited by the same deed or instrument out of the same subject of property." 1. Preston's Est., 90; see language of Clark, J., in Lawrence's Est., 136 Pa. 354 at 366

(1890). "The event which terminates the particular estate must be an event implied in the character of the estate itself, and not an external contingency." Edward Jenks, 20 Law Quar. Rev., 281 (1904).

ascertained person subject to a preceding life estate or series of life estates in the same property created by the same instrument.

Pepper & Lewis's Definition of a Vested Remainder

43. The learned editors of Pepper & Lewis's Digest of Decisions, title Remainders,⁹ offer the following definition of a vested remainder: "A vested remainder may be defined as an estate in real or personal property which will necessarily take effect in possession upon the termination of a precedent estate created by the same instrument, and which is subject to no other contingency than the termination of the precedent estate; and it is immaterial that the remainderman will not necessarily be in esse when the precedent estate ends, since the certainty of his actual possession of the property in the future is not a pre-requisite to the immediate vesting of the remainder in interest." To this definition, there are several serious objections. (1) It assumes the disputed point whether there can be a remainder in personal property.¹⁰ (2) The notion that it must necessarily take effect in possession upon termination of the precedent estate is clearly erroneous. Thus, suppose a devise to A. for life, then to B. for life, then to C. in fee. In this case the life estate of B. is vested, although since he may die before the death of A. it may never take effect in possession. (3) The suggestion that "it is immaterial that the remainderman will not necessarily be in esse when the precedent estate ends" is difficult to understand. The learned editors perhaps meant by this phrase that if the remainder in fee is vested it is immaterial if the remainderman dies during the continuance of the precedent estate, as in such case his heirs will take. This is the law, but if they meant it, they should have said so. Even thus qualified, the remark applies only to a remainder in fee, and not to a remainder for life. (4) The last part of the definition, "since the certainty of his actual possession is not a pre-requisite to the immediate vesting," is more accurate but totally inconsistent with the first part of the definition, which says that the remainder must necessarily take effect in possession upon the termination of the precedent estate.

⁹ Column 30294.

¹⁰ See §§95, 96, 97, as to future interests in personal property.

Attributes of a Vested Remainder

44. A vested remainder has always been freely alienable, descends to heirs, and is devisable, the same as a fee or a reversion, and the same principle, without doubt, obtains in Pennsylvania today.¹¹ Cases of vested legal remainders, except where there is a remainder to a class, are very rare in modern times owing to the increasing use of equitable limitations.

Remainders Subject to a Term of Years

45. The tenant for years was not seised.¹ Consequently when the seisin was distributed at the time of the feoffment, an attempt to give any part of the same to a lessee was nugatory, and any attempt to give the seisin to the remainderman after the expiration of the term, was unavailing as an attempt to create a freehold to begin in futuro. In order that the remainder might not fail, the courts construed words importing a gift of the remainder after the term as an immediate gift of the freehold subject to a term of years.² All terms were originally short, and the long terms were introduced after the rule became fixed. The error, therefore, if any, was not in allowing such a construction of the gift, but in permitting terms of undue length.³ A limitation of this kind was before the court of Common Pleas of Philadelphia County, in *Morris v. Fisher*.⁴ Sulzberger, J., in delivering the opinion of the court, admitted that the law in England was as stated, and then came to the conclusion that the law in Pennsylvania was otherwise, on grounds which are not easy to understand. This was a case of a gift of an estate tail subject to a term of ninety-nine years.⁵ No other case on the point has been found in Pennsylvania.

Conditions Subsequent and Vested Remainders

46. A condition subsequent did not affect the quality of the remainder as a vested remainder, because the condition

¹¹ Is devisable: *Commonwealth v. Hackett*, 102 Pa. 505 (1883). No other case has been found.

¹ See §88, post.

² *Challis*, Real Prop., 2 ed. (1892), pp. 89, 90.

³ The ambiguous nature of the interest

after a term of years, is pointed out by Mr. Challis, Real Prop., 2 ed. (1892), p. 70.

⁴ 8 D. R. 161 (1899).

⁵ For further criticism of the case, see §363, post.

would not affect the immediate grant by the feoffor to the remainderman. Indeed, the condition subsequent could not operate unless there had been a previous vesting. If the condition subsequent happened, it was said to divest the remainder, and if the condition was uncertain or might happen before the termination of the preceding estate, it would necessarily follow that the remainder might never vest in possession.⁶ A vested remainder, therefore, partook of the nature of both kinds of future interests—those which were sure to arise, and those which might never arise. The court will, however, whenever possible, construe a condition as a condition subsequent or as annexed to other estates. This is a rule of construction supposed to be founded on the alleged partiality of the law for vested rather than contingent remainders. There is room to surmise that this is not the real reason. This point will not be further pursued, as rules of construction will, so far as possible, be avoided. A few examples of the application of the rule in Pennsylvania are given in the note,⁷ and it may be remarked, before leaving the subject, that a large part of the cases on vested remainders arise over the application of this rule of construction. There is, first, the principle of law that a condition subsequent does not make a remainder less vested, then the principle of construction, which turns every condition into a condition subsequent whenever possible.

⁶ For a further discussion of this point, see §63, n. 2, post.

⁷ A devise to A. for life, and if he leaves lawful issue, to such issue, and if he dies without issue or they die under 21 without lawful issue, then to B. and his heirs and assigns, on condition that he pay three hundred pounds to a hospital three months after the death of A.; held, an estate tail in A., with a vested remainder in B.; *Evans v. Davis*, 1 Yeates, 332 (1794); *Shippen, J.*, at 341 said that the condition as to payment was a charge, particularly as it was payable after the death of A. To A. for life, and to his heirs, if he have any, and if he does not have any heirs, then to his grandchildren, B., C. and D.; A.

took a fee tail; B., C. and D. took vested remainders; *Bassett v. Hawk*, 118 Pa. 94 (1888). To A. for life, and at her death, to testator's son, provided he shall "remain with my wife and myself until our decease," and provided also, that he shall pay certain sums to testator's other children upon certain contingencies; vested remainder in the son; *McCall v. McCall*, 161 Pa. 412 (1894). So also where there is a power of appointment and a remainder in default of appointment, the exercise of the power is construed as a condition subsequent and the remainders are vested; *Gray*, Rule Perp., 2 ed. (1906), §112; *Challis*, Real Prop., 2 ed. (1892), p. 65, *semble*; *Freeman's Est.*, No. 1, 35 Super. Ct. 185 (1908).

Remainders After an Estate Tail

47. A remainder after an estate tail, not subject to any condition precedent, was, of course, vested. When such remainders could be barred by the destruction of the estate tail, the contingency of the tenant in tail not suffering a recovery or levying a fine was considered as a condition subsequent and the remainders were still regarded as vested.⁸ As the estate tail is obsolete in Pennsylvania,⁹ these remainders are likely to be of infrequent occurrence. Vested remainders after an estate tail, when it is turned into a fee, become executory devises.¹⁰ As a case of an old estate tail may arise, it is perhaps worth noting that a limitation over after indefinite failure of issue after a previous life estate or a fee, was construed as an estate tail. This was a rule of construction adopted in order that the limitation over could take effect.² Consequently, the limitation which would otherwise be void as an executory devise was valid as a vested remainder.³ The dictum contra of Woodward, J., in *Vaughan v. Dickes*,⁴ is inexplicable.

Origin of Contingent Remainders

48. Where, however, the remainder was subject to a condition precedent, the case was different. It could not be said to vest immediately in anyone, because it could not vest until the condition happened. It could not, therefore, fulfill the feudal notion of substitution for the reversion, nor could it partake of the seisin distributed by the feoffor at the time

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §111; *Eichelberger v. Barnitz*, 9 Watts, 447, Sergeant, J., at 450 (1840), *semble*; *Lapsley v. Lapsley*, 9 Pa. 130 (1848), vested remainders after an estate tail were barred by a common recovery in Pennsylvania and by a deed under the Act of January 16, 1799. *Eichelberger v. Barnitz*, 9 Watts, 447 (1840); *Vaughan v. Dickes*, 20 Pa. 509 (1853).

⁹ See §23, *ante*.

¹⁰ For instances of a vested remainder after an estate tail, see *Clark v. Baker*, 3 S. & R. 470 (1817), and *Irvin v. Dunwoody*, 17 S. & R. 61 (1827).

² *Lewis, Perp.*, (1843), pp.177,178. It is to be observed, however, that the failure may be in issue of the devisee taking an estate capable of being enlarged or diminished, or may be failure in the issue of a third party. There is, of course, no room for implication of an estate tail except in the first instance. See *Jarman on Wills*, 6th Amer. ed. (1893), Vol. 1, Chap. 17, §6; *Lewis, Perp.* (1843), pp. 175-177.

³ See remark of Sergeant, J., in *Eichelberger v. Barnitz*, 9 Watts, 447 at 450 (1840).

⁴ 20 Pa. 509 at 514 (1853).

he made the feoffment. The result was the same whether the condition was sure to happen or might never happen. A remainder subject to a condition precedent was therefore utterly void at the early common law. The history of contingent remainders is involved in great obscurity, and many interesting points yet remain to be cleared up.

Contingent Remainders Valid

49. The validity of remainders subject to a condition precedent, was finally allowed⁵ when the contingency happened before or at the termination of the preceding estate. The contingent remainderman was then entitled to the remedy of a vested remainderman, the remainder becoming vested. The difficulty consisted in giving the remainderman any seisin when the contingency happened. He was not present at the feoffment; how, then, could he acquire any seisin? The difficulty was gotten over by the fiction of a constructive seisin, by the notion that a seisin sprang from another part of the fee to sustain the remainder, when the event happened. If the contingency happened after the termination of the preceding estate, the contingent remainder could never take effect.⁶

Definition of a Contingent Remainder

50. A contingent remainder, therefore, was a remainder⁷ subject to a condition precedent, which condition might be (1) the ascertainment of a person; (2) the happening of an event other than the regular termination of the preceding estate.⁸

⁵ Date uncertain. Digby, *Hist. Law Real Prop.*, 5 ed., (1897), p. 265, says by the reign of Edward III., middle of 14th Cent.; Williams on *Real Prop.*, 6 Amer. ed. (1886), p. 263, says by the end of the 15th Century. Earliest form appears to have been to A. for life, and then to the heirs of B. Digby, *ubi supra*, p. 266.

⁶ For further discussion of this point, see §§54-62, on destructibility of contingent remainders.

⁷ Mr. Fearn's definition is as follows: *Remainders*, p. 3: "A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate,

for if the preceding estate determine before such event or condition happens, the remainder will never take effect."

⁸ This is the classification suggested by Lord Chief Justice Willes, in *Smith v. Packhurst*, House of Lords, 3 Atk. 135 (1742): (1) where a remainder is limited to a person not in being, and who may possibly never exist; (2) where the remainder depends on a contingency collateral to the continuance of the particular estate. All four classes of Mr. Fearn may be reduced to these two heads. See article *Vested and Contingent Interests and the Rule against Perpetuities*, 56 *Univ. of Pa. Law Rev.*, p. 245 (1908).; Challis, *Real Prop.*, 2 ed. (1892), p. 65.

Attributes of a Contingent Remainder at Common Law

51. A contingent remainder was nothing in the eye of the law.⁹ It was a mere possibility, and consequently was not transmissible to heirs, and was not alienable inter vivos, nor devisable by will. A contingent remainder was also liable to be destroyed by the destruction or termination of the preceding particular estate before the happening of the condition precedent.¹⁰

Attributes of a Contingent Remainder in Pennsylvania

52. Under the law of Pennsylvania, a contingent remainder, before the happening of the contingency, is subject to execution,¹ is inheritable when the person who is to take is ascertained,² and probably devisable. A contingent remainder is not assignable at law by deed inter vivos, although the deed may operate as an estoppel in equity.³

Contingent Remainders in Pennsylvania

53. The same principles govern the creation of contingent remainders in Pennsylvania, as obtained at common law. A few examples are given in the note.⁴

⁹ Challis, *Real Prop.*, 2 ed. (1892), p. 76.

¹⁰ For a discussion of this, see §§54-62, post.

¹ *Drake v. Brown*, 68 Pa. 223 (1871); see, however, *Wilson v. Denig*, 166 Pa. 29 (1895).

² *Brooke's Est.*, 15 D. R. 137 (1905).

³ *Stewart v. Neely*, 139 Pa. 309 (1890).

⁴ *Remainders to an unascertained person.* Remainder to the heir male of A. if living at her death. Contingent remainder in the heirs male: *Dunwoodie v. Reed*, 3 S. & R. 435 (1817); *Challis, Real Prop.*, 2 ed. (1892), p. 120. To A. for life, then to her only heir during its life; contingent remainder in the heir, as the meaning was, to such person as should be A.'s heir: *Bennett v. Morris*, 5 Rawle, 9 (1835). Remainders to a class are discussed §§67-71, post. *Contingent remainders to an ascertained person subject to a condition precedent.* To A. for life, and after his decease,

if he shall die leaving lawful issue, to his heirs as tenants in common, and their respective heirs and assigns forever, but in case he shall die without leaving lawful issue, then to B. and his heirs; contingent remainder in B.: *Stump v. Findlay*, 2 Rawle, 168 (1828). To A. for life, and if he have lawful issue, to him in fee, and if he should die without leaving issue, then to testator's other children in fee, in equal shares; contingent remainder in A.: *Waddell v. Rattew*, 5 Rawle, 231 (1835); see also *Drake v. Brown*, 68 Pa. 223 (1871). To a daughter and her husband for life, and if she dies without children, her husband, if he survives her, to have the property (by codicil) in fee, contingent remainder in husband: *Fife v. Miller*, 165 Pa. 612 (1895). Contingent remainders of this class are rare, as in most cases the court will construe, see §46, ante, the condition as a condition subsequent.

Preliminary Discussion of Destructibility of Contingent Remainders

54. Whenever the preceding particular estate came to an end or was destroyed before the happening of the event, the contingent remainder limited thereon was deprived of any opportunity of taking effect, or, as was more commonly though less accurately said, the contingent remainder was destroyed.⁵ The circumstances mentioned prevented the remainder from existing. It could not be destroyed before it existed. The common statement is, however, perhaps sufficiently accurate for practical use, and will be adopted in the discussion which follows. If the event happened before the termination or destruction of the preceding estate, the remainder at once became vested. The destruction or termination of the preceding estate might happen in one of several ways: (1) forfeiture, (2) surrender, (3) merger, (4) tortious alienation, (5) turning to a right of action, (6) natural expiration of the precedent estate.⁶ In England, as well as in some jurisdictions in this country, statutes have been passed saving contingent remainders upon the too early termination or the destruction of the preceding estate.⁷ There is no such statute in Pennsylvania.⁸ It will therefore be necessary to ascertain how far the destruction of the preceding particular estate will destroy contingent remainders limited thereon in Pennsylvania. The subject can be conveniently discussed under the headings above indicated.⁹

Forfeiture

55. When the tenant of the preceding estate did any act which resulted in forfeiture of his estate, the contingent remainders limited thereon were destroyed if the event had not yet happened.¹ The cases of forfeiture which could occur at common law are, with the exception of the common recovery,² obsolete in modern times. There are a few instances, however,

⁵ Challis, *Real Prop.*, 2 ed. (1892), p. 110.

⁶ Challis, *Real Prop.*, 2 ed. (1892), p. 124.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §286; Williams, *Real Prop.*, 6th Amer. ed. (1886), p. 278.

⁸ See remarks of White, J., in the court below in *Stewart v. Neely*, 139 Pa. 309 at 311 (1890).

⁹ It was this liability to destruction of the contingent remainder which led to the device of trustees to preserve contingent remainders, for a discussion of which see §§159, 160, post.

¹ Challis, *Real Prop.*, 2 ed. (1892), p. 124.

² Discussed §23, ante.

which may occur in Pennsylvania. Forfeiture for treason is limited by the constitution of Pennsylvania,³ to the life of the offender. It is doubtful how far forfeiture of the life estate in such case would destroy the contingent remainders limited thereon.⁴ Where there is a valid clause of forfeiture attached by a donor to a life estate,⁵ with contingent remainder limited thereon, and the forfeiture takes place, it is apprehended, although no case has been found, that the contingent remainders will be destroyed. So also alienation in mortmain without license will work a forfeiture,⁶ and probably destroy the contingent remainders limited on the life estate aliened.

Surrender

56. Surrender was where the tenant of the precedent estate gave up his estate to the next vested remainderman. This resulted at common law in squeezing out the intervening contingent remainders, if any.⁷ There is no reason why the law should be different in Pennsylvania. The question does not seem to have arisen.

Merger

57. Merger was where the next vested estate of inheritance came to the tenant of the preceding estate, which could happen by a conveyance or devise. Merger operated to destroy the contingent remainders limited on the preceding estate.⁸ The law in Pennsylvania appears to be the same.⁹ Where the merger takes place simultaneously with the creation of

³ Art. 1, §19, Const. of 1874.

⁴ There is a dictum in *Evans v. Davis*, 1 Yeates, 332 at 341, 342 (1794), that forfeiture of the particular estate for treason destroys the contingent remainders limited thereon, which dictum was criticised by Gibson, J., in *Lyle v. Richards*, 9 S. & R. 322 at 344 (1823), on the ground that the life estate only was forfeited to the commonwealth, just as it existed in the traitor, and there was no annihilation of the life estate itself. No other case on the point has been found.

⁵ As to when such a clause is valid, see §§225-229, post.

⁶ Act of April 26, 1833, P. L. 167, §1.

⁷ Challis, *Real Prop.*, 2 ed. (1892), p. 125.

⁸ Challis, *Real Prop.*, 2 ed. (1892), p. 125.

⁹ In *Bennett v. Morris*, 5 Rawle, 9 (1835); *Jordan v. McClure*, 85 Pa. 495 (1877), it was decided that a merger destroyed the contingent remainders. In *Stewart v. Neely*, 139 Pa. 309 at 311 (1890), there is a dictum to the contrary, which can have no weight in view of the express previous decisions.

the preceding estate, as by the application of the rule in Shelly's case, the contingent remainders were not destroyed,¹⁰ and the same principle obtains in Pennsylvania.¹ It is important to remember that merger arises by operation of the law because of the union of the estates in the same person, while surrender is due to the intention of the parties.²

Tortious Alienation

58. Tortious alienation at common law took place by a fine, a feoffment or a common recovery. These assurances could operate to vest a greater estate than that previously owned, and destroyed the estate of the person making the assurance. And where contingent remainders were dependent on that estate, they were in like manner destroyed.³ Fines and feoffments are obsolete in Pennsylvania; common recoveries were in frequent use,⁴ and it seems that a common recovery had the same effect as at common law, and when suffered by the tenant of the preceding estate, destroyed the contingent remainders limited thereon.⁵

Innocent Conveyance—Pennsylvania Deed

59. Where, however, the conveyance was innocent, it vested in the grantee the same estate which the grantor had, and the contingent remainders limited thereon followed the estate in the hands of the grantee, and could take effect if the contingency

¹⁰ Challis, Real Prop., 2 ed. (1892), p. 126.

¹ *Stewart v. Kenower*, 7 W. & S. 288 (1844); *Eby v. Shank*, 196 Pa. 426 (1900).

² Challis, Real Prop., 2 ed. (1892), p. 77.

³ Challis Real Prop., 2 ed. (1892), p. 127.

⁴ For a history of common recoveries in Pennsylvania and their effect on estates tail, see §23, ante.

⁵ *Dunwoodie v. Reed*, 3 S. & R. 435 (1817); Tilghman, C. J., Gibson, J., dissenting, said that a contingent remainder could not be destroyed by a common recovery, and that there was a difference of opinion among the members of the profession on the point. The language of Gibson, C. J., in *Stump v. Findlay*, 2

Rawle, 168 (1828), would seem to indicate that he had come to the opposite conclusion, and was of the opinion that the common recovery would bar the contingent remainders. See also language of Clayton, P. J., in *Boyer v. Smith*, 1 Del. Co., 93 (1880). Deed to bar an entail made under the Act of Assembly, does not destroy the remainder to a class, if it is vested in some members of the class during the continuance of the preceding estate. Some of the remainders were clearly vested when the conveyance was made: *Gernet v. Lynn*, 31 Pa. 94 (1857); same will as was before the court in *Miller v. Lynn*, 7 Pa. 443 (1848). The report is not clear as to whether they were all vested at that time.

happened in time. A conveyance by a cestui que use⁶ and a conveyance by lease and release⁷ are innocent. So also a Pennsylvania deed under the Act of 1715,⁸ does not operate to destroy contingent remainders limited on the particular estate conveyed.⁹

Turning Into a Right of Action

60. If the precedent estate was first turned into a right of entry by the disseisin of the tenant thereof, and that right of entry was turned into a right of action by descent cast on the part of the disseisor, and the latter event took place before the happening of the contingency, the contingent remainders limited on the preceding estate were destroyed.¹⁰ It seems that the right of the disseisee in Pennsylvania is a right of action, and further, that the doctrine of descent cast does not obtain.¹ A contingent remainder, therefore, is not destroyed by an

⁶ Fearne, Remainders, p. 321.

⁷ Fearne, Remainders, p. 322.

⁸ May 28: 1 Sm. L. 94, §5.

⁹ Dictum, Gibson, C. J., in *Stump v. Findlay*, 2 Rawle, 168 at 175 (1828); *Miller v. Lynn*, 7 Pa. 443 (1848). It was argued by counsel, however, in *Carmichael v. Thompson*, 8 Sadler's Cases, 120 at 126 (1886), that a contingent remainder was destroyed by the conveyance of the precedent life estate. The point was not passed on by the court. The argument is probably unsound. The Act of April 18, 1853, §2, P. L. 503, as amended by the Act of June 14, 1897, P. L. 144; amendment passed in consequence of the decision in *Keller v. Lees*, 176 Pa. 402 (1896), authorizing the sale of land subject to contingent remainders, the proceeds of the sale to take the place of the land, seems to lend strength to the view that the conveyance of the precedent estate does not destroy the contingent remainder. Mr. Justice Thompson, in *Grenawalt's App.*, 37 Pa. 95 at 99 (1860), made use of the following language: "It was clearly an object of the statute, which I think clearly appears, that whenever a sale is required of real estate on which

are limited contingent interests by way of remainder or executory devise, to sell the entire estate out and out, and substitute the proceeds for the realty, after the necessary deductions for expenses and the means applicable to the objects calling for the sale. This would produce clear titles to the land, and give effect to the limitations on the fund. In fact, it is a method of clarifying, if I may use the term, titles otherwise clouded with contingent interests." See *Westhafer v. Koons*, 144 Pa. 26 (1891), where the Supreme Court held that the contingent remainders were not barred by the proceedings in question because the requirements of the act had not been complied with. See *Smith's Est.*, 207 Pa. 604 (1904). Where, however, the conveyance operates as a merger, it will destroy the contingent remainders; *Bennett v. Morris*, 5 Rawle, 9 (1835); see remarks of Porter, J., in *Funck's Est.*, 16 Super. Ct. 434 at 441 (1901).

¹⁰ Challis, *Real Prop.*, 2 ed. (1892), p. 128.

¹ Mitchell, *Real Est. and Conveyancing in Penna.*, pp. 265, 266 (1890); Price, *Limitations and Liens*, Chap. III, pp. 35, 36 (1857).

adverse possession against the tenant of the precedent life estate. The remainder, if it is going to take effect at all, becomes vested at or immediately before the termination of the preceding estate. The right of action or right of entry on the part of the remaindermen, therefore, accrues at that time, and the statute begins to run from the termination of the precedent life estate.²

The Natural Termination of the Precedent Particular Estate

61. A contingent remainder was always destroyed by the termination of the precedent life estate before the happening of the contingency. It is clear that this is the law in Pennsylvania today. It was doubtful at common law whether an infant *en ventre sa mere* could take by virtue of a contingent remainder if the precedent estate expired before his birth.³ This doubt has been remedied by statute in England.⁴ There is no such statute in Pennsylvania, and the law, therefore, is in the same condition of uncertainty as at common law, as the point does not appear to have been decided. By statute in England, contingent remainders which conform to the rule against perpetuities are saved from destruction by the termination of the precedent estate before the happening of the contingency.⁵ There is no such act in Pennsylvania, and the law is clear that the remainders are destroyed by such termination.

Summary of Law in Pennsylvania as to Destructibility of Contingent Remainders

62. It will therefore appear that contingent remainders in Pennsylvania are destroyed by the surrender,⁶ merger⁷ or natural expiration of the preceding estate upon which they depend,⁸ and also by a common recovery suffered by the tenant of that preceding estate tail;⁹ that it is doubtful whether they are destroyed by forfeiture of the preceding estate for treason or for violation of a restriction imposed by a previous owner of the title,¹⁰ and that they are not destroyed by a

² See *Gernet v. Lynn*, 31 Pa. 94 (1857), *semble*. The point does not appear to have been expressly decided.

³ *Challis*, Real Prop., 2 ed. (1892), p. 123.

⁴ *Challis*, Real Prop., 2 ed. (1892), p. 129.

⁵ *Challis*, Real Prop., 2 ed. (1892), p. 129.

⁶ §56, *ante*.

⁷ §57, *ante*.

⁸ §61, *ante*.

⁹ §55, *ante*.

¹⁰ §55, *ante*.

conveyance of the preceding estate by a lease and release,¹¹ by a Pennsylvania deed under the Act of 1715,¹² or by a conveyance by the cestui que trust.¹³

Distinction Between Vested and Contingent Remainders

63. It is not easy to state the distinction between a vested and contingent remainder. The difficulty is caused by the perhaps unconscious effort to make the conception of a vested and contingent remainder square with the natural idea of certain and uncertain future interests. It is therefore frequently concluded that the uncertainty of its ever taking effect is a distinguishing characteristic of a contingent remainder. This notion is erroneous,¹ as is also the idea that a vested remainder is a remainder which is certain to take effect. A vested remainder may be just as uncertain of coming into possession as is a contingent remainder.² The distinction between a vested and contingent remainder lies solely in the absence or presence of a condition precedent incorporated into the gift, and the certainty or uncertainty of its ever coming into possession is utterly immaterial. This distinction was a vital one while the common law doctrines relating to seisin prevailed. Although the importance of seisin has disappeared, the distinction remains as a mere empty form of words entirely disassociated from any natural conception of a classification of future interests, and it is this unhappy legacy from the common law which causes the difficulty. The distinction has

¹¹ §59, ante.

¹ See remarks of Willes, C. J., in *Smith v. Packhurst*, 3 Atk. 135, House of Lords (1742), as follows: "The definition of a contingent remainder laid down by the counsel for the plaintiff that a remainder was contingent when it was uncertain whether it would take effect or not, is by no means the legal notion of a contingent remainder." See also remarks of Allison, J., in *Kirk's Est.*, 6 Phila. 73 at middle of page 74, (1865).

² A vested remainder is uncertain to arise when it is liable to be prevented from coming into possession by the happening of an uncertain event.

Thus, where there is a devise to A. for life, remainder to B. and his heirs, but if B. dies before the termination of the particular estate, then to C. and his heirs, B. has a vested remainder which may never take effect. This is the case discussed by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §104 et seq., and Mr. Kales, 20 *Harv. Law Rev.*, 192 (1907). The difficulty in the case is caused by the attempt to force this remainder into the class of contingent remainders, merely because it is uncertain to arise, and the condition is precedent to the coming into possession.

been perpetuated because of the difference in the attributes of the two kinds of remainders.³

Mr. Gray's Distinction

64. Mr. Gray⁴ draws the line between vested and contingent remainders thus: "A remainder is vested in A., when throughout its continuance, A., or A. and his heirs, have the right to immediate possession whenever and however the preceding estate may determine." This test is merely a statement of the practical result of the circumstance that a vested remainder is never subject to a condition precedent. There is, therefore, no inconsistency between this and the language of Mr. Gray,⁵ where he says that the distinction depends on the language used. The question whether there is a condition precedent depends on the form of the gift. If there is no condition precedent, the practical results stated in the test follow. Mr. Kales⁶ appears to have misunderstood this proposition. Mr. Gray says the remainder is vested in A., when throughout its continuance, A., etc. Mr. Kales speaks of the remainder as being vested, when the *remainder* is ready throughout its continuance, etc., overlooking the fact that there must be a specific person who is ready, etc. From this misapprehension, he slips into the fallacy that a limitation to A. for life, remainder to his surviving children, may be a vested remainder in the children because under certain construction which may be put upon the gift, the children are ready at all times to take whenever and however the precedent estate ends. This remainder, however, cannot be vested, because even if there is a child ascertained he cannot take until he has fulfilled the condition precedent of surviving A. It is further to be observed that Mr. Gray's test does not actually solve the problem because the vital question is this: when there is a right to immediate possession, and the answer to this question depends on whether there is or is not a condition precedent.

³ The learned reader will observe that a remainder may be contingent as originally limited in the settlement, but by the happening of the event may, when the time for the consideration arises, be a vested remainder.

⁴ Rule Perp., 2 ed. (1906), §101.

⁵ Gray, Rule Perp., 2 ed. (1906), §108, although Mr. Kales, in 20 Harv. Law Rev., 192, 193 (1907), supposes such an inconsistency to exist.

⁶ 20 Harv. Law Rev., 192, 193 (1907)

*Obliteration of the Distinction Between Vested and
Contingent Remainders*

65. The vesting in interest of the vested remainder gave it certain attributes² which did not pertain to a contingent remainder.³ The contingent remainder has acquired all of the attributes in Pennsylvania⁴ of a vested remainder except two: (1) the quality of assignability at law *inter vivos*; but as a contingent remainder is unquestionably assignable in equity, the distinction is not of great practical importance. (2) The other distinction is the destructibility of the contingent remainder,⁵ by the termination of the preceding estate before the happening of the contingency. It is hardly likely that the court can get rid of these distinctions without the assistance of the legislature. It is very much to be desired that these distinctions be abolished, as there is no practical usefulness whatever in maintaining the two kinds of remainders.

Remainder to the Unborn Child of an Unborn Person

66. It has been said that there was a common law rule that you could not limit a remainder to the unborn child of an unborn person, because you could not have a possibility upon a possibility. Mr. Gray⁶ examines this doctrine most thoroughly, and comes to the conclusion that there is no such rule of common law. It appears to have been recognized in England,⁷ and it is perfectly possible for the Supreme Court in Pennsylvania to reach a similar conclusion. The question whether this rule shall be adopted seems to be one rather of expediency than of principle, and is discussed in the subsequent part of the work relating to the application of the rule against perpetuities to contingent legal remainders.⁸

Remainders to a Class

67. The case of a remainder to a class stands midway between a vested remainder and a contingent remainder. The statement usual in the books is that the remainder is to the

² See §44, ante.

³ See §51, ante.

⁴ See §52, ante.

⁵ See §62, ante.

⁶ Rule Perp., 2 ed. (1906), §§125-134, 287-298, 294-298g.

⁷ *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85; see 19 Harv. Law Rev., 635 (1906).

⁸ See §§364-367, post.

class, as if the class were an entity; that the remainder vests as soon as one member of the class is ascertained and then opens to let in after-born children.⁹

Mr. Gray's View of Remainders to a Class

68. Mr. Gray¹⁰ is of the opinion that although the remainder is said to be vested, it is in truth contingent; that it is vested in so far as it is certain that whenever and however the preceding estate determines there will be one or more persons who will surely come into possession of the land;¹ but contingent in so far as it is not certain what the number of those persons will be. In other words, as the number and consequent size of the share is contingent, the remainder cannot be truly said to be in all respects vested.² This position of the learned author is made necessary by his apparent acceptance of the notion that the gift is to the class. The test suggested, as to the vesting of the remainder, only applies to the case where one or more members are ascertained. This view has the further disadvantage that under it the remainder is named as vested, and then described and analyzed as contingent, a confusion in terminology to be avoided, if possible.

Author's View of Remainders to a Class

69. It is suggested that the remainder is not to the class but to the members of the class as individuals. Those who

⁹ See *Keller v. Lees*, 176 Pa. 402 (1896). In this case the court said that the remainder became vested as soon as a child was born, and therefore the case was not within the Act of 1853, see §59, n. 9, ante, providing for the sale of land subject to contingent remainders. If, however, the interest of one child was vested, that was enough, under the law as it then stood, to prevent the sale. The other remainders could not be divested and the one remain, because it could not be determined until the termination of the life estate, what the share of each in the land would be. It is suggested that this was the proper

ground for the decision. *Crawford v. Forest Oil Co.*, 208 Pa. 5 (1904).

¹⁰ Rule Perp., 2 ed. (1906), §§110, 110a, 205a.

¹ This language should, of course, be understood, although such may not have been the author's meaning, to have reference only to the case where there has been at least one member of the class already ascertained.

² If the uncertainty that a remainder will ever take effect cannot destroy its quality as a vested remainder, neither, it is submitted, can the uncertainty of the value of the remainder be of any moment.

are ascertained when the gift is made³ take vested remainders.⁴ The notion that the gift is to a class is a fiction, which no doubt played a part in the development of contingent remainders. While it is not likely that the Supreme Court will easily abandon the notion, it is necessary to clear thinking to bear in mind what the real nature of the remainder is. If the class is such that other members may be ascertained after the date of the gift, there is a contingent remainder as to such members.⁵ The contingency as to those members not in esse at the time of the gift is that the remainder is to unascertained persons. Such a remainder might partake of the nature of either class of contingent remainders: (1) A gift to a class all of whom will be ascertained before the expiration of the preceding particular estate; a contingent remainder of the second class.⁶ (2) A gift to a class, some of whom may not be ascertained until after the expiration of the preceding particular estate;⁷ a contingent remainder partaking of the nature of both classes. The remainders vested in the members already ascertained are not disturbed, but there is a diminution in the size or value of each remainder.

Conditions Annexed to Remainders to a Class

71. A condition may be annexed to a gift of the remainder to a class, which condition may be precedent or subsequent.

³ This is at the testator's death, in the case of a will, and the date of the deed in the case of a gift inter vivos.

⁴ Gift by a testator to his widow for life, and at her death to his children in equal shares, gives a vested remainder in the children who are ascertained at the testator's death; *McKee's App.*, 96 Pa. 277 (1880); *Algaier's Est.*, 16 D. R. 913 (1907).

⁵ Consequently, an action of partition at law will not lie during the continuance of the life estate; *Gest v. Way*, 3 Whart., 445 (1837). The law on this point partially changed by the Act of June 3, 1840, P. L. 593. See opinion of the court below in *Seiders v. Giles*, 141 Pa. 93 at 99 (1891). For a case of a defective partition under the Act, see *Holmes v. Woods*, 168 Pa. 530 (1895); see also

Holmes v. Fulton, 193 Pa. 270 (1899). Judgment in ejectment will not be entered for those already ascertained to the exclusion of those who may afterward be ascertained; *Rudebaugh v. Rudebaugh*, 72 Pa. 271 (1872).

⁶ E. g., a gift to A. for life, and after his death to his children, would partake only of the second class, as all his children must be ascertained at his death. There would be no contingency of any child being ascertained after the termination of the preceding particular estate.

⁷ E. g., a gift to A. for life, and after his death to his grandchildren, would partake of the first class, as the grandchildren born after the death of A. could not take because they would be ascertained after the termination of the preceding particular estate.

When the condition is subsequent, it will not affect the vesting in the members of the class as they are ascertained.⁸ The same rule of construction applies here as noted before,⁹ and the court will construe the condition as a condition subsequent whenever possible.¹⁰

Definition of a Possibility of Reverter

72. The possibility that a fee other than a fee simple absolute may revert to the grantor by the natural determination of the fee or by breach of the condition upon which it is granted, is a possibility of reverter. It is not an estate but a possibility to have an estate at a future time.¹

Validity of Possibility of Reverter

73. Mr Gray takes the ground² that the Statute of Quia Emptores³ put an end to determinable fees by abolishing the

⁸ Thus, a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A., his share to go to those who survive. The remainder is vested in each child as born, subject to be divested. For an instance of a remainder to members of a class vested in one member subject to an executory devise, see *DeHaas v. Bunn*, 2 Pa. 335 (1845).

⁹ See §46, ante.

¹⁰ See *Johnson v. Morton*, 10 Pa. 245 (1849). The usual difficulty is over the word "surviving," which will be construed to mean surviving at the death of the testator unless a contrary meaning is clearly indicated. Thus, where there was a devise to A. for life, and when she shall depart this life, the children born of her body shall possess the land, and I give the land at the time of A.'s decease to the children which are born of her body. The children of A. living at the death of the testator took vested remainders: *Minnig v. Batdorff*, 5 Pa. 503 (1847). To A. for life, and at his death, to be divided equally among his surviving children. Vested

remainder in the children living at testator's death. *Ross v. Drake*, 37 Pa. 373 (1860). For a few cases where the remainder was construed as contingent, see *Waddell v. Rattew*, 5 Rawle, 231 (1835); *Goddard v. Goddard*, 10 Pa. 79 (1848); *Rudy's Est.*, 185 Pa. 359 (1898).

¹ Gray, *Rule Perp.*, 2 ed. (1906), §31; *Challis, Real Prop.*, 2 ed. (1892) p. 73. Mr. Challis distinguishes several possibilities of reverter. He also points out, p. 66, note, that the word "possibility" has been used in a number of different senses. The distinctions he draws would seem to have no practical value in Pennsylvania law. The word "possibility" is rarely used with us, and when used, would seem to be confined to the possibility of reverter. The use of the word with reference to a contingent remainder is perhaps obsolete now that contingent remainders have acquired a present legal value. See §52, ante, on the attributes of a contingent remainder.

² *Rule Perp.*, 2 ed. (1906), §§31-41, and Appendix E.

³ *Westminster III*, 18 Edward I., c. 1 (1289).

possibility of reverter, without which the words of qualification would be a mere empty declaration. Mr. Challis⁴ says that the statute did not put an end to determinable fees, and the instances of determinable fees which he cites which have been recognized in England, would seem to make the question of little practical value. There is a doubt whether the Statute of Quia Emptores is in force in Pennsylvania.⁵ Since possibilities of reverter have been recognized and enforced in England, where the statute is admittedly in force, and have also been recognized and enforced in Pennsylvania,⁶ any discussion on the Statute of Quia Emptores in this connection would seem to be somewhat remote and is therefore omitted.

Possibilities of Reverter in Pennsylvania

74. The cases relating to determinable fees already cited⁷ impliedly recognize the validity of a possibility of reverter. In only three cases has the right actually been enforced. In *Henderson v. Hunter*⁸ the fee had determined, and the grantees thereof were not allowed to recover in an action of trespass q. c. f., as their title was gone. In *Courtney v. Keller*⁹ the right was enforced in an action of ejectment. In *Slegel v. Lauer*¹⁰ the parties entitled to enforce the reverter filed a bill in equity to have the original deed of conveyance of the determinable fee cancelled, and the court made a decree ordering the deed delivered up and the recorder to cancel the deed on the record. The interposition of equity here seems questionable. The title went back of itself, and if possession were refused the parties entitled could have brought ejectment or trespass, and if there was any doubt about the marketa-

⁴Challis, *Real Prop.*, 2 ed., (1892), Appendix IV.

⁵Charter to William Penn (1681); *Ingersoll v. Sergeant*, 1 Whart. 337 (1836). In the case of *Wallace v. Harmstad*, 44 Pa. 492 (1863), the court said, although unnecessary to the decision of the case, that there was no tenure in Pennsylvania, but did not profess to overrule *Ingersoll v. Sergeant*. *Wallace v. Harmstad* has been criticised, and

it is believed that the better opinion is that the Statute of Quia Emptores is not in force in Pennsylvania. See Gray, *Rule Perp.*, 2 ed., (1906), §26, for a very able discussion of the law in Pennsylvania.

⁶See §74, post.

⁷See §27, ante.

⁸59 Pa. 335 (1868). See remarks of Agnew, J., at 341 and 343.

⁹4 Penny. 38 (1884).

¹⁰148 Pa. 236 (1892).

bility of the title, that doubt could have been settled in a proper action between the plaintiffs and their vendees.¹

Attributes of a Possibility of Reverter

75. A possibility of reverter was heritable at common law and devisable under the Statute of Wills, but was not assignable inter vivos.² The possibility is clearly inheritable and devisable in Pennsylvania, although no decision to that effect has been found, and is assignable by deed inter vivos at law.³

Right of Entry for Condition Broken

76. A condition is where there is annexed to the grant of an estate at common law, a proviso either in the same deed or in another deed, that upon the doing of some act dependent on the will of the grantee, the grantor can re-enter and have back the estate which he granted. The right of the grantor is called a right of entry for condition broken, and can be enforced only by actual re-entry by the grantor or his heirs.⁴ Such conditions are of frequent occurrence in modern times, and the right to enter for condition broken has been recognized in Pennsylvania.⁵ The right to re-enter at common law was an estate in the land, was heritable but was not devisable or assignable inter vivos.⁶ It is assignable inter vivos in Pennsylvania at least in the case of a ground-rent deed.

Distinction Between Possibility of Reverter and Right of Entry for Condition Broken

77. The distinction between a possibility of reverter and a right of entry for condition broken depends on the difference

¹ The decree actually made would seem to have no real effect on the matter. The court was powerless to order the destruction of the original deed as a common law conveyance. It had already operated at common law, and the court could no more recall it than it could recall the day before yesterday. It is important to recollect in this connection that the cancellation of the deed is only necessary in a jurisdiction like England, where there are no recording acts, and consequently a deed is liable to be used fraudulently. In Pennsylvania

the proper decree would seem to be to order a reconveyance where a reconveyance is necessary, and have that reconveyance recorded.

² Challis, Real Prop., 2 ed. (1892), 66, n. 2.

³ Penna. R. R. Co. v. Parke, 42 Pa. 31 (1862); Slegel v. Lauer, 148 Pa. 236 (1892).

⁴ Challis, Real Prop., 2 ed. (1892), p. 192.

⁵ See cases cited, §367, post.

⁶ Challis, Real Prop., 2 ed. (1892), pp. 66, 67.

in the grants upon which they respectively arise. In the case of a determinable fee, the title reverts of itself⁷ upon the happening of the event specified, without any clause to that effect,⁸ and without any conveyance. This consequence flowed from the theory of the determinable fee, which is that the fee is granted until a certain event shall happen, and no longer. In the case of a condition, the whole fee is granted, and there is a condition upon which it can be taken back. The grantor or his heirs must make an entry before the right can be enforced.⁹ It is often difficult to distinguish between the two cases.¹⁰

Executory Devise Defined

78. The exact origin of the executory devise and the meaning of the term are involved in some obscurity. It will be sufficient for our purpose to refer the limitation to the provisions of the Statute of Wills,¹ which permitted devises to be made by the owner "at his free will and pleasure." The courts, therefore, allowed a freedom of disposition which had been unknown at common law.² An executory devise has been defined as "a limitation by will of a future estate or interest in land, which cannot consistently with the rules of law, take effect as a remainder."³ The two most common instances of

⁷ This is neatly illustrated by the case of *Henderson v. Hunter*, 59 Pa. 335 (1868), see §74, ante.

⁸ Although such a clause is sometimes inserted.

⁹ *Challis on Real Prop.*, 2 ed. (1892), p. 234 et seq. This distinction was overlooked by the reporter in the first paragraph of the syllabus of *Methodist Church v. Public Ground Co.*, 103 Pa. 608 (1883), which reads as follows: "Wherever words in a conveyance are relied upon as creating a condition subsequent, so as to create a base or determinate fee, they must not only be such as would of themselves create a condition, but must be so connected with the grant as to qualify or restrain it." This is plainly a notion of the reporter, and is not supported by any decided case or by anything to be found in the language of the court. The nearest approach is the language of Mr. Justice Mercur, on p. 614,

where he says: "Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it." See also opinion of the court below, in *Siegel v. Lauer*, 148 Pa. 236 at 244 (1892).

¹⁰ See *Challis, Real Prop.*, 2 ed. (1892), p. 233. See the doubtful case of *Penna. R. R. Co. v. Parke*, 42 Pa. 31 (1862).

¹ 32 Henry VIII., Chap. 1 (1540); 34, 35 Henry VIII., Chap. 5 (1542).

² *Challis on Real Prop.*, 2 ed. (1892), p. 157.

³ *Watson, P. J.*, in *Lovett v. Lovett*, 10 Phila. 537 at 540 (1873). See *Fearne, Remainders*, p. 382, et seq. There is a rule of construction to be noticed, which is that no limitation shall be construed to be an executory devise if it may take effect as a remainder; *Fearne, Remainders*, p. 387; *Challis, Real Prop.*, 2 ed. (1892), p. 161.

an executory devise are a devise over after a fee,⁴ and a gift of the whole estate to begin in futuro.⁵

Attributes of an Executory Devise

79. An executory devise was generally indestructible at common law by any determination or disposition of the preceding estate except with the concurrence of the executory devisee. Where, however, an executory devise was limited after an estate tail, it was destructible by a common recovery, and in Pennsylvania by the deed which took the place of that cumbersome action.⁶ Under the Acts turning an estate tail into an estate in fee,⁷ an executory devise limited on the estate tail would remain and take effect if otherwise valid, and become indestructible, as a common recovery cannot be suffered by a tenant in fee.⁸ An executory devise in Pennsylvania is heritable, although the devisee die before the happening of the contingency,⁹ is a subject of levy and sale under execution,¹⁰ and is devisable under the Statute of Wills.¹ An executory devise was not assignable by deed inter vivos at common law,² but the law is now probably otherwise in Pennsylvania.³ An executory devise may also be released by the executory devisee.⁴

Distinction Between a Contingent Remainder and an Executory Devise

80. The distinction between a contingent remainder and an executory devise is well put by Mr. Butler⁵ as follows: "The principal difference between contingent remainders and executory

⁴ See *Nicholson v. Bettle*, 57 Pa. 384 (1868).

⁵ *Chambers v. Wilson*, 2 Watts, 495 (1834); stated §450, post.

⁶ *Fearne, Remainders*, p. 423-424; *Linn v. Alexander*, 59 Pa. 43 (1868), *semble*; *Sharswood, J.*, in *Taylor v. Taylor*, 63 Pa. 481 at 486 (1870); *Ralston v. Truesdell*, 178 Pa. 429 (1896). The dictum of *Gibson, C. J.*, *contra* in *Boyd v. Bigham*, 4 Pa. 102 at 109 (1846), is obscure and may be disregarded.

⁷ See §23, ante.

⁸ *Fearne, Remainders*, p. 424 (Butler's Note E. V.); see also pp. 428, 429.

⁹ *Challis, Real Prop.*, 2 ed. (1892), p. 164; *Fearne, Remainders*, p. 554.

¹⁰ *DeHaas v. Bunn*, 2 Pa. 335 (1845).

¹ *Challis, Real Prop.*, 2 ed. (1892), p. 164.

² *Challis, Real Prop.*, 2 ed. (1892), p. 164.

³ Dictum, *Parsons, J.*, in *Rash's Est.*, 2 *Parsons*, 160 at 161 (1850).

⁴ *Coates Street*, 2 *Ash*, 12 (1831); *Fearne, Remainders*, p. 423.

⁵ Note to *Fearne, Remainders*, p. 416.

devises is, first, that a contingent remainder may be limited in conveyances at common law; an executory devise is admitted only in last wills and testaments. Secondly, that a contingent remainder relates only to lands, tenements and hereditaments; an executory devise respects personal estates as well as real. Thirdly, that a contingent remainder requires a freehold to precede and support it; an executory devise requires no preceding estate to support it. Fourthly, that a contingent remainder must vest, at farthest, at the instant the preceding estate determines; but in respect to an executory devise, if there be any preceding estate, it is not necessary that the executory devise should vest when such preceding estate determines. And fifthly, that the great and essential difference between the nature of a contingent remainder and that of an executory devise consists in this, that the first may be barred and destroyed or prevented from taking effect by several different means; but it is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited."

Escheat, Dower and Curtesy

81. Escheat occurred when the lord, by virtue of the feudal tenure, took the land upon a failure of the heirs of the tenant. The right was feudal,⁶ and extended only to real estate. It exists in Pennsylvania today by statute, and therefore arises by operation of law. In like manner, dower and curtesy are not created by the act of the donor. They are, therefore, not within the rules treated in this book.⁷

Rights in the Land of Another

82. There are a number of cases of rights which one man may have in the land of another, such as easements, profit a prendre, etc. These rights cannot arise except by the consent, expressed or implied, of the servient tenement, and are rarely created by gift. For that reason they will not be discussed.⁸

⁶ Challis, Real Prop., 2 ed. (1892), Chap. 6, p. 33.

⁷ See §380, post.

⁸ See §366, post.

Rights Arising by Contract

83. Interests in property sometimes arise by contract, as in the case of covenants as to the use of land, etc. These interests are outside the scope of this book, as they do not arise by way of gift.⁹ Therefore no further comment on them is necessary.

Summary of Future Legal Interests in Land

84. The reversion is a present interest in land. The future interests in land are remainders, vested and contingent, possibilities of reverter, rights of entry for condition broken, and executory devises. All of these future interests have survived in Pennsylvania. Vested remainders, executory devises, rights of entry for condition broken, are indestructible except by the consent of the party entitled thereto, but contingent remainders are destructible under certain circumstances. Whatever the common law may have been, all of these interests are now freely devisable, heritable, and probably assignable by deed inter vivos, and are liable for debts. It would also appear that there is no rule of the common law relating to the creation of any of these estates except the rules to which we have particularly referred. We have now examined the legal future interests in land, and in Part III¹⁰ will consider the application of the rule against perpetuities to these interests.

⁹ See §381, post.

¹⁰ See Chap. 16, §§360-370, post.

CHAPTER 4

PERSONAL PROPERTY

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History of Personal Property

86. It is a mistake to assume, as is often done, that personal property was scarce and of little value in feudal times.¹

¹ Pollock & Maitland's Hist. Eng. Law., Vol. 2, 1 ed., p. 148, 2 ed., p. 149.

Rights in personal property, if not older than rights in land, are at least as old.² Little is known about the early law of personal property,³ and its subsequent development is involved in considerable obscurity. It will not be possible in the space available to introduce a thorough discussion. Our chief concern will be with the nature of future interests in personal property.

Kinds of Personal Property

87. Personal property is of three kinds: (a) chattels real, the only instance of which is a term of years, or what we would in modern times call a lease; (b) chattels personal; (c) choses in action. All words attached to a gift of personal property which would have the effect of passing less than an absolute estate in real property were disregarded as they could have no legal effect. The first taker had the entire interest, and if the gift was of a term of years, and the term lasted longer than the life of the first taker, it went to his executors. This principle has been relaxed in modern times so far as to admit of a life estate in chattels real or personal. It seems clear, however, that there can be no estate tail in a chattel real.⁴

Term of Years

88. The term of years occupies an anomalous position. It was formerly an unfree tenement and protected only in the lord's court. It was subsequently, by the invention of a special action, brought within the jurisdiction of the King's court. The estate, although thus made practically a freehold

² Ownership in land was a much more intense and completely protected right than was the ownership in a chattel. There is no absolute ownership in chattels in modern law. Pollock & Maitland's *Hist. Eng. Law*, Vol. 2, 1 ed., p. 151, 2 ed., p. 153. It may be doubted, however, whether the prevailing conception of ownership in chattels is not a conception of an absolute ownership.

³ Pollock & Maitland's *Hist. Eng. Law*, Vol. 2, 1 ed., p. 149, 2 ed., p. 150.

⁴ Smith, *Executory Interests*, 307 et seq; Smith's App., 23 Pa. 9 (1854); Brewster, J., in the court below in Kar-

ker's App., 60 Pa. 141 at 151 (1869). The dictum contra of Sulsberger, J., in *Morris v. Fisher*, 8 D. R. 161 (1899), may be disregarded as opposed to principle and the weight of authority. The Act of 1855, see §23, ante, probably does not apply to personal property for the reason that it was not supposed that at that time an estate tail could be created in personal property. The law has struggled for centuries to get rid of the estate tail, see §§23, 24, ante, in real estate, and there is no occasion to introduce it now into the law of personal property.

estate, retained its former characteristics as an unfree tenement. The termor was still said to be possessed and not seised. Leases in England were uncommon before the year 1200, and originally ran only for a very short period. In their earliest form they were beneficial to the lessee, and were purchased for a premium as investments for capital. From these circumstances, the term came to be considered as a chattel interest and as devisable by will.⁵ The lease in modern times partakes more of the nature of a contract than it does the nature of an estate. It is usually considered under the separate heading of the law relating to landlord and tenant, and most of the principles discussed in this book are subject to some variation in the case of a term of years. This estate will therefore only be referred to incidentally at a few points, and will be considered in the main as outside the scope of the book.

Choses in Action

89. A right in personam arising from a tort is, in its nature, not assignable. A right under a contract is not assignable without the consent of the other party to the contract. Insurance policies are not assignable, but restrictions on their assignment will be upheld. The right of a partner is not assignable at common law without the consent of the other partner. Right of a stockholder is generally assignable. Promissory notes and bills of exchange were in a class by themselves; they were neither choses in action nor were they chattels personal; they were considered as things, the title to which passed by delivery in some cases; in others, when so expressed, by assignment on the back. They originated in the law merchant, which was introduced from the continent of Europe, and principles relating to them cannot be said to be a part of the early common law.⁶ It has been suggested by a learned author,⁷ that the non-assignability of choses in action at the common law was the result of the incapacity of the medieval lawyers to think of a right as being transferred, and was not the result, as has been commonly supposed, of the laws of champerty and maintenance.

⁵ For a discussion of the reason why a term of years came to be personal property, see Pollock & Maitland's *Hist. Eng. Law*, Vol. 2, 1 ed., p. 105, 2 ed., p. 106 et seq.

⁶ Gray, *Restraints on Alien.*, 2 ed. (1895), §2.

⁷ *The Mystery of Seisin*, by F. W. Maitland, 2 *Law Quar. Rev.*, 481 at 495 (1886).

Alienability of Personal Property

90. It thus appears that there has been very little controversy over the alienability of personal property. It was freely alienable inter vivos and by will from the earliest times, and no restrictions on such alienability appear to have been attempted. Inalienability of choses in action appears to have been the result of incapacity to think of such rights as being assignable, and when such inalienability has survived to modern times, it is to be explained by the nature of the chose itself.

Preliminary Discussion of Future Legal Interests in Personal Property

91. That we can today have future legal interests in personal property is familiar to every lawyer, and most of them will be surprised that any question should be raised as to the matter. This, however, has not always been the law, and it is not quite clear on just what theory future interests are sustained.⁸ We will therefore discuss future interests in personal property and briefly notice the various theories which have obtained as to such interests.

Transfers Inter Vivos of Chattels Real

92. In the case of chattels real, the only instance of which is a term of years, the interest passes to the executors on the death of the lessee. An estate in fee could formerly be created in a term of years, that is, an estate which passed on the death of the lessee to his heirs.⁹ By the subsequent common law, a limitation to heirs was considered as a limitation to executors.¹⁰ A term of years or sub-lease was always allowable,

⁸ A future interest in personal property may, of course, easily be raised by way of a trust. For discussion of this see §163, post. All equitable limitations of personal property, chattels real or chattels personal, are trusts, if the statute of uses does not apply to personal property. If it does apply, a use of personal property becomes a legal interest, and future legal interests in personal property can be limited by way of use. Since it is doubtful whether

the statute of uses applies to personal property in Pennsylvania, the possibility of the creation of such future legal interests would have to be left open on the authorities. See §123, post, on the application of the statute to a use of personal property.

⁹ Pollock & Maitland's Hist. Eng. Law, Vol. 2, 1 and 2 ed., pp. 110-117; Gray, Rule Perp., 2 ed. (1906), §805.

¹⁰ Gray, Rule Perp., 2 ed. (1906), §805.

and is in frequent use today.¹ There could be no life estate in a chattel real, because there was a legal presumption that a life estate was greater than a term of years, which, no matter how long, would merge in the life estate; consequently, when there was a grant of a long term of years to one for life, with remainders over, the grant was void and the life tenant took the whole, and, if he died, it went to his executors.² This seems to be the law in England today.³ No case has been found in Pennsylvania. Mr. Gray⁴ thinks that a grant of a life estate with remainders over by deed inter vivos would be good in the United States generally. It is probable that the Supreme Court will find some way to sustain the gift.

Transfers by Will of Chattels Real

93. The validity, however, of a limitation of a future interest in a term of years after a life estate when made by will, was established in the sixteenth century.⁵ The theory upon which it was sustained was this: the apparent order of the limitation was reversed, and the gift of the term to A. for life and after his death to B., was considered as a gift by way of an executory devise or bequest of the whole term to B., after the death of A., and then a gift of what remained to A.⁶ The validity of such limitations has been confined in England to gifts by will. No case has been found in Pennsylvania which raises the point nor has any case been found of a limitation of a future interest in a term of years. There is no reason why the law should be different from that which obtains at the common law, and unless, therefore, some particular reason should be pointed out, it would seem that the law in Pennsylvania is the same.

Reason Why Question of Future Interest in a Chattel Real Has Not Arisen in Pennsylvania

94. The lessor, the owner of the land, had a reversion⁷ after the termination of the lease. A gift to A. for ten years

¹ Pollock & Maitland's Hist. Eng. Law, Vol. 2, 1 and 2 ed., 112; Gray, Rule Perp., 2 ed. (1906), §806. In such case, the reversion remains in the owner of the chattel and is a vested interest. Gray, ubi supra §806.

² Lewis, Perp., (1843), p. 85; Gray, Rule Perp., 2 ed. (1906), §§71, 807, 808.

³ Gray, Rule Perp., 2 ed. (1906), §71b.

⁴ Gray, Rule Perp., 2 ed. (1906), §71b.

⁵ Lewis, Perp., p. 85 (1843); Gray, Rule Perp., 2 ed. (1906), §813.

⁶ Gray, Rule Perp., 2 ed. (1906), §§74, 815.

⁷ See §§37, 45, ante.

created a term of years in A., a leasehold interest. The idea familiar in modern times is that a lease implies a payment of rent and must be drawn up on some one of the forms in common use for that purpose. This idea is not altogether accurate, but represents practically the view of a chattel real in modern times. The tenant is a man who must pay the rent, and that liability to pay the rent is of very little value. The terms of years are usually very short—three or five years generally the longest, and no interest in a leasehold is likely to be of any value until real estate conditions change very materially, and until that time none of the questions presented by this discussion are likely to occur in Pennsylvania law. A gift of a term of years is very rare in Pennsylvania.

Gifts Inter Vivos of Chattels Personal

95. An absolute interest was the only kind of interest recognized in chattels personal and a gift of a life estate carried the whole ownership. There could be no reversion or remainder in a chattel personal.⁸ The absolute owner of chattels personal, however, might give the use and occupation thereof to another. He might make a bailment.⁹ Since a parol gift of a chattel is invalid without delivery, there can be no gift of a chattel personal by parol to begin in futuro.¹⁰ If the conveyance is by deed or for value, the law, of course, is otherwise. It seems, therefore, that in England there can be no limitation of a future legal interest in chattels personal by deed inter vivos.¹ Mr. Gray points out there is no decision or authoritative dictum to that effect, that the authority of Blackstone² is to the contrary, and that it is the law in the United States generally that legal future interests in personal property may be limited by deed inter vivos.³ No case has been found in Pennsylvania on this point,⁴ but there is no reason why such a limitation should not be valid

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §822; Ames, *Disseisin of Chattels*, 3 *Harv. Law Rev.*, 23, 313, 337 (1890); Maitland, *Seisin of Chattels*, 1 *Law Quar. Rev.*, 324 (1885).

⁹ Gray, *Rule Perp.*, 2 ed. (1906), §§78, 825.

¹⁰ Gray, *Rule Perp.*, 2 ed. (1906), §77.

¹ Gray, *Rule Perp.*, 2 ed. (1906), §829.

² 2 *Bl. Com.*, 398.

³ Gray, *Rule Perp.*, 2 ed. (1906), §§91, 97, 844.

⁴ The validity of such limitation seems to be admitted by Woodward, J., in a dictum in *Brink v. Michael*, 31 Pa. 165 at 169, 3rd paragraph, opinion (1858).

and of the same nature as a future interest limited by will.⁵ But on the other hand since an executory bequest cannot be created by deed, it seems that such an interest, if limited by deed, must take effect as a remainder.

Gift by Will of Chattels Personal

96. The validity of a bequest of chattels personal to A. for life, and after his death to B., was established by the last half of the seventeenth century, on the ground that there was a bequest of the use and occupation to the life tenant for his life, and a bequest of the right of property to B.,⁶ and the validity of such bequests in modern times is unquestioned.⁷

Law as to Future Legal Interests in Personal Property Created by Will in Pennsylvania

97. A future legal interest in personal property can be created by will in Pennsylvania, is devisable, assignable in equity,⁸ and passes to personal representatives if the legatee

⁵ As to this, see §96, post.

⁶ Gray, Rule Perp., 2 ed. (1906), §§84, 828.

⁷ Gray, Rule Perp., 2 ed. (1906), §95. The theory upon which the bequest is to be sustained is not clear. There are, according to Mr. Gray, taking the case of a bequest of a personal chattel to A. for life, and at his death to B., three views: (1) A. may be considered as having a right to possession at law, and the immediate vested right of property as being in B. (2) A. may be considered as having the legal right to property which at his death shifts to B. (3) The whole interest may pass at law to A., who will hold the chattel in trust for himself for life, and, on his death, for B. Mr. Gray, *ubi supra* §90a, says that the choice between the theories is material in determining whether (1) there is a reversion after a gift of a life estate, without any disposition of the remainder; (2) whether the future interest violates the rule against perpetuities. It is submitted that the first question does not concern us here, because if there is a

reversion, it is not subject to the rule, and if there is no reversion, the first taker has the whole interest, and there is no occasion for the rule to apply. As to the second, the learned reader will find the subject discussed in chapter 16, dealing with the interests subject to the rule. See also Gray, Rule Perp., 2 ed. (1906), Appendix F.

⁸ Fearn, *Remainders*, 549. As to the assignability in equity, it is to be observed that the phrase is not strictly accurate. The assignment is of the legal interest, but cannot take effect before the happening of the contingency, because there is nothing to assign. A court of equity, however, compels the assignor to make good the assignment when the contingency happens. The assignment, therefore, does not take place in equity, but is an attempted assignment at law of the legal interest, which the assignor is compelled to perfect under processes of the court of equity, in order to prevent unjust enrichment on his part at the expense of the assignee who has paid for the interest.

dies before the happening of the contingency.⁹ No case discussing the nature of such an interest has been found, and the remarks of the judges are conflicting. The cases are poorly digested and difficult to find. A few have been collected in the note.¹⁰ A future legal interest in personal property created by will may be described as a remainder or executory devise. Unfortunately, however, the courts have carried over into the construction of limitations of future interests in personal property, the feudal notions which obtain at common law with respect to limitations of future interests in real property, and have said that a future interest in personal property is vested when limited by the words which would create a vested interest if the limitation were of real estate, and is contingent when

⁹ *Hopkins v. Jones*, 2 Pa. 69 (1845).

¹⁰ Pennsylvania cases of future legal interests: *Scott v. Price*, 2 S. & R. 59 (1815); *Tilghman, C. J.*, said of a gift of money, that it was an executory devise; *Deihl v. King*, 6 S. & R. 29 (1820), executory devise; *Patterson v. Hawthorn*, 12 S. & R. 113 (1824). Where there was a gift of personal estate to C. for life, with a gift over at her death if there was a certain sum left to B. and D. and B. died before C. An action of debt was brought by the administrators of B. against the executors of C. Judgment for the plaintiff in the court below was affirmed on appeal. *Rogers, J.*, in the Supreme Court, said: "We are therefore of the opinion that this was an executory devise of all the personal estate to C. with a vested legacy to B. and D. and as such, transmissible to representatives;" *Candler v. Dinkle*, 4 Watts, 143 (1835); *Brownfield's Est.*, 8 Watts, 465, *Kennedy, J.*, at 469 (1839); *King v. King*, 1 W. & S. 205 (1841); *Kelso v. Dickey*, 7 W. & S. 279 (1844); executory bequest; *Hopkins v. Jones*, 2 Pa. 69 (1845). *Fearne, Remainders*, p. 402, *Butler's Note*; *Burd v. Burd*, 40 Pa. 182 (1861); *Stehman's App.*, 45 Pa. 398 (1863); *Kirk's Est.*, 6 Phila. 73 (1865); *Umstead & Reiff's App.*, 60 Pa. 365 (1869); *Chess's App.*, 87 Pa. 362

(1878); *Pennock v. Eagles*, 102 Pa. 290 (1883); *Gormley's Est.*, 154 Pa. 378 (1893); *Bruch's Est.*, 185 Pa. 194 (1898). Called a remainder; *Zimmerman's Est.*, 23 Super. Ct. 130 (1903). Future legal interests in personal property are designated as remainders in the Acts of Feb. 24, 1834, P. L. 70, and May 17, 1871, P. L. 269, as to which see §99. *Heiss' Est.*, 1 Pa. C. C. 397 (1886), is a good instance of a life estate in personal property followed by a limitation, called by *Penrose, J.*, at p. 399, an executory bequest. In many cases of a gift of personal property, which, strictly speaking, are limitations at law, the court has said that there was a trust, and considered the case accordingly: *Bruch's Est.*, 185 Pa. 194 (1898); *McKee's Est.*, 198 Pa. 255 (1901); *Reilly's Est.*, 200 Pa. 288 (1901); *Menoher's Est.*, 18 Super. Ct. 335 (1901). In many cases of a residuary clause, where there is real and personal property, the court has not made any distinction. *Menoher's Est.*, 18 Super. Ct. 335 (1901). In a number of cases, where a legacy is given at a future time, the court has said that the legacy is vested in interest with the postponement of time of payment. *Maxwell v. McClintock*, 10 Pa. 237 (1849).

the limitations would create a contingent interest in real estate.¹ A future legal interest in personal property, therefore, whatever its nature, may be vested or contingent. This is a case where the law of real property has invaded the domain of personal property. A future legal interest in personal property can take effect even though there is a gap between that and the precedent particular estate, as the doctrines of merger, surrender and tortious alienation are not applied to personal property, and the destruction of the precedent estate will not affect the validity of the contingent interest. The fungible nature of personal property makes all future interests thereof precarious in a manner which does not obtain with respect to remainders in personal property. This difficulty has been remedied in Pennsylvania by the legislation hereinafter referred to.²

Conversion

98. Where there is such a direction in the will that there is an equitable conversion, the conversion operates immediately as of the death of the testator, and the limitations are to be construed as if they were limitations of personal property.³ Strictly speaking, however, the interests are equitable and should not be considered as legal limitations. This point seems to have been overlooked in practice.

Pennsylvania Statutes Relating to Future Interests in Personal Property

99. The Act of February 24, 1834,⁴ provides that the executors of a will shall not be compelled to deliver personal property bequeathed to a legatee not having an absolute interest therein, without security being given to secure the interest of those entitled in remainder. The Act of May 17, 1871,⁵ provides that an executor or trustee shall deliver the personal property upon security being entered, and the Act of April 17, 1869,⁶ provides that the owner of a contingent interest in personal property may require an account and compel the

¹ *Candler v. Dinkle*, 4 Watts, 143 (1835); *Burd v. Burd*, 40 Pa. 182 (1861). see remarks of Gordon, J., at 245 (1877); *Ashton's Est.*, 134 Pa. 390 (1890).

² See §99, post.

⁴ P. L. 70, §49.

³ *Patterson v. Hawthorn*, 12 S. & R. 113 (1824); *Eby's App.*, 84 Pa. 241,

⁵ P. L. 269, §1.

⁶ P. L. 70, §1.

previous legatee to give security before receiving the same. These acts were probably intended to restore the old English chancery doctrine, which required security to be given to protect future legal interests in personal property,⁷ although it has been intimated⁸ that the acts apply to trusts, which question however does not further concern us here. Reference to the acts is useful as showing the legislative recognition of future legal interests in personal property.⁹

Summary

100. It appears, therefore, that the validity of a future interest in personal property, when created by will, is unquestioned in Pennsylvania; that it is an executory bequest¹⁰ in the case of chattels real, with the theory uncertain in the case of chattels personal;¹ that perhaps no future legal interests can be created by deed inter vivos in England, but that the law in Pennsylvania is uncertain, with the probability that such an interest can be created.²

⁷ Jarman, on Wills, Vol. 1, p. 850, 6th Amer. ed., (1893).

⁸ Penrose, J., in *Mooney's Est.*, 27 Pa. C. C. 450 (1902).

⁹ A few of the cases which have arisen on these acts are as follows: *Culbertson's App.*, 76 Pa. 145 (1874); *Feiser's Est.*, 1 Walk. 256 (1879); *Watson's App.*, 125 Pa. 340 (1889); *Sims's App.*, 130

Pa. 451 (1889); *McCann's Est.*, 16 Phila. 270 (1883); *Oakford's Est.*, 4 Pa. C. C. 465 (1888), s. c. 18 Phila. 662; *Key's Est.*, 16 Pa. C. C. 456 (1895); *Teller's Est.*, 15 D. R. 53 (1905).

¹⁰ See §93, ante.

¹ See §96, ante.

² See §§92, 95, ante.

CHAPTER 5

USES AND TRUSTS BEFORE THE STATUTE OF 27, HENRY VIII

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Origin and History of the Use

105. Equitable limitations of land began with the use. The word "use" is derived from the Latin word "opus," which, in the old French, became "os" or "oes," and was often used in the early thirteenth century to denote what, in modern times, would be called an agency, and was applied to chattels as well as to real estate.¹ Property was conveyed by John to Stephen *ad opus et ad usem* William, and the significance of the transaction was that William alone was to benefit from the property conveyed to Stephen.² The use was chiefly

¹ Pollock and Maitland, *Hist. of Eng. Law*, Vol. 2, 1 ed., p. 231, 2 ed., p. 233, et seq. The use represented a vague idea, which idea branched, on one side, into the law of agency, and, on the other side, into the law of trusts; the distinction perhaps being that a trust is always predicated of a specific res, which an agency is not. The researches of modern scholars have so thoroughly exploded the notion which was discussed at length in the older text books, see Perry, *Trusts* Vol. 1, §2, 5 ed. (1899) Mitchell,

Real Est. and Conveyancing in Penna. (1890), p. 211, that the trust had its origin in the *fidei commissum* of the Roman law, that further reference to the subject is superfluous.

² A use was a confidence placed in the feoffee to permit the feoffor, or such other person as he should direct, to receive the rents and profits and also to make such legal estates as he or they should direct. Saunders, *Uses*, Vol. 1, p. 3 (1823).

employed to vest the beneficial ownership of land in such a way as to escape creditors,³ the Statutes of Mortmain, and the burdens of feudal tenure.⁴ The use was enforced solely in chancery and the cestui que use escaped many burdens and restrictions which fell on the holder of the legal title. This condition of affairs was felt, for many reasons, to be undesirable, and statutes were passed from time to time to bring the use within the rules of the common law.⁵ These efforts toward a control of the use, which, as was quaintly said, was a nimble and elusive thing, culminated in the statute which will be discussed in the next chapter. Before proceeding to this, a brief reference will be made to some of the salient characteristics of the use. A use was raised on transmutation of possession, in which case it would be express or implied, or without transmutation of possession, in which case it would require a bargain and sale or covenant to stand seised to uses.

Express Use Raised on Transmutation of Possession

106. The usual method of conveying land in England was by feoffment with livery of seisin. At the time of the feoffment, the feoffor declared the use, if any, to which the feoffee was to hold the land. This declaration could be by parol, and it seems as if the practice originally was to make the feoffment to the use of the feoffor.⁶ No consideration was necessary to the validity of such a use, either on the part of

³ See Statute 50, Edward III, Chap. 6 (1376), avoiding gifts made to use by collusion to escape creditors.

⁴ Such as the right of the lord of the fee, to relief, wardship, fine for alienation and escheat for want of heirs. The method of getting rid of feudal burdens was this: land was conveyed to A., B. and C., as joint tenants to the use of X. and his heirs. When A. and B. died, C. would convey to three other persons, and thus the legal title would be prevented from falling into the condition in which the lord of the fee would be entitled to any of his feudal rights. In the meantime, the equitable owners succeeded each other without being subject to any feudal burdens. The use

"enabled the equitable owner to extract the honey while the legal tenant guarded the hive." Edward Jenks in 20 L. Q. Rev., 284 (1904). The use, therefore, was a disadvantage to the feudal lord in so far as his feudal inferior was concerned, and an advantage to him in so far as his feudal superior was concerned.

⁵ For a very good collection of these statutes and the early cases, see pamphlet by Mr. Ames, *Uses and Trusts Before the Statute of 27, Henry VIII.* See also article by Mr. Ames, *Origin of Uses and Trusts*, 21 Harv. Law Rev., 261 (1908).

⁶ Thus, John would enfeoff William of Blackacre to the use of himself or to the use of Stephen.

the cestui que use or the feoffee to uses.⁷ If, however, a consideration passed, the feoffor could not declare the use to himself.

Implied Use Raised on Transmutation of Possession

107. The use, being the right to the possession, to take the rents and profits, was, in fact, a part of the entire ownership of the land, and seems to have been conceived of by the medieval lawyers as passing with every feoffment, separate and apart from the ownership, but included therein as a part of the whole. Whether because of this technical notion of the use,⁸ or because of the almost universal custom of declaring a use on every feoffment, there grew up a number of presumptions which have survived to modern times. It was said that where no use was declared, it would result to the person who paid the consideration. Thus, where William enfeoffed Stephen of Blackacre in fee, and John paid the consideration, the use resulted to John, and Stephen became seised to the use of John in fee. The reason given in the later text books is that the law presumed that a man would not part with value without expecting some recompense, and that it was therefore the intention of the parties that the feoffee should hold to the use of the person paying the money. If, however, no consideration was paid, and no use declared prior to the Statute of Quia Emptores, a use was in the feoffee, as there was a tenure implied in every feoffment which was a sufficient consideration. But after the statute, if no use was declared and no consideration paid, the use resulted to the feoffor. So also where the feoffor declared a partial use to himself, the fee was in the feoffee, because there was no room for any presumption as to the intention of the parties since the intention was expressed. And since every grant is to be taken most strongly against the grantor, it is presumed that if the feoffor wished to have a larger use in himself, he would have said so. Where the feoffor declared a partial use to a third person, the remainder resulted to himself, because after the termination of the partial use, the presumption applied. It seems, however, that there was no

⁷ 1 Anderson, 37, placitum 95 (1535); Ames, Cases on Trusts, p. 108.

⁸ Digby, Hist. Law of Real Prop., 5th

ed. (1897), pp. 370-372, calls attention to the scholastic notions which affect the development of the use; see §147, post.

resulting use except in the case of a conveyance in fee simple, and that all resulting uses were in fee.

Uses Raised Without Transmutation of Possession

108. If the owner did not part with the title, he could create a use in either one of the following ways: first, by covenant to stand seised to uses. This was a covenant by which the owner declared that he held the property for the use of the persons designated. Such a covenant was valid only in so far as the parties designated stood in a relation of blood or affection to the covenantor. Second, by bargain and sale, which was where the owner agreed to sell the property to someone else. A consideration was necessary to support the bargain and sale. After the execution of the agreement, the use was in the bargainee. The use could be raised without transmutation of possession only by words in praesenti and upon a good and valuable consideration.⁹ Where there was a transmutation of possession, the feoffor could keep the land for nothing unless the use was enforced, and the fact, therefore, that the original declaration of trust was gratuitous, was immaterial. When there was no transmutation of possession, the owner himself would keep the land which was his own before if the use was not enforced. Chancery, therefore, requires a consideration before enforcing the use against him, and depriving him of his property. These principles underlie the modern law of trusts.

Definition of a Use

109. A use, therefore, was a relation enforceable only in chancery, in which the feoffee to uses had no duties to perform, except (1) to permit the cestui que use to take the rents and profits, (2) to convey the legal title at the latter's direction, and was the exact counterpart of what is known in modern times as a dry or passive trust.

Special Trusts

110. It was frequently the case that the feoffor vested active duties in the feoffee, directing him to take and receive

⁹ Callard v. Callard, Croke. Eliz. 344 See Ames, Hist. of Assumpsit, 2 Harv. (1594), s. c. Moore, 687, placitum, 950 Law Rev., 1. at 18, 19 (1888). (1596); Ames, Cases on Trusts, p. 117.

the rents and profits or perform some other duty in connection with the legal title. Such directions created an active or special trust which was different from a use.¹⁰ There were, therefore, two distinct equitable limitations: the use and the trust. We will now consider the statute of uses, and the effect which it had on these two relations, and then briefly notice the law relating to trusts.

¹⁰ Bacon, *Uses*, Rowe's ed., pp. 8, 9; Saunders, *Uses*, Vol. 1. pp. 3, 4, 5 (1823).

CHAPTER 6

THE STATUTE OF USES

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The Statute of Uses

113. In the case of an equitable limitation of real estate, the intention of the settlor may be frustrated by (1) the Statute of Uses, (2) the rule against perpetuities, (3) the rule forbidding restraints on alienation, (4) the rule forbidding restraints on enjoyment. The distinction between these four principles has not always been clearly observed, and it is necessary to the proper understanding of the last three to give some attention to the first. The final legislative effort¹ to control the use, was the passage of the act of 27 Henry VIII,² commonly known as the Statute of Uses, which provided, inter alia, that where any person was seised to the use of anyone else, the legal seisin should be in that person, according to the character and quality of the use or trust that was in the cestui que use.³ This is the most important statute affecting the use, and we shall give it careful attention.

The Effect of the Statute on the Legal Title

114. By the operation of the statute, the legal title immediately passes from the feoffee into the cestui que use, or, viewing the transaction from the point of view of the donor, the legal title passes by the statute through the feoffee into the cestui que use, and, as is said, the use is executed in the cestui que use, and he has at once, by the force of the statute, the legal title. The feoffee in such cases, it is said, acts as a mere conduit pipe to transfer the title from the donor into the cestui que use.⁴ It is clear, however, that the statute cannot pass any greater title into the cestui que use than was in the feoffee to uses.⁵

¹ The student will observe that the Statute of 27, Henry VIII, is the last of a series of statutory regulations extending over a century, and is not, as some statements in the books would seem to imply, the only statute on the subject.

² Chap. 10, (1536).

³ The first ten sections of the statute, except the eighth, are in force in Pennsylvania. Report of the Judges, 3 Binney, p. 618 (1808). The learned reader will find the full text of the statute given in Gray's Cases on Property, Vol. 1, p.

468 and Digby, Hist., Law Real Prop., 5th ed. (1897), p. 347 et seq.

⁴ Lowrie, J., in *Kuhn v. Newman*, 26 Pa. 227 at 230 (1856), said, speaking of the operation of the statute, that it was merged. This is a somewhat inaccurate statement. A statute can never be merged. The learned judge probably had in mind the thought that the legal title was merged in the use by the operation of the statute.

⁵ Perry on Trusts, Vol. 1, §312, 5 ed. (1899).

Effect of the Statute on the Common Law

115. The probable intent of the statute was to make the use a common law right, and thus subject it to common law rules. The real effect, however, was to draw the use into the common law, taking with it the freedom of disposition which had theretofore obtained only in equity. The courts said, that as a use could be created before the statute, that it could be created as well afterward, and when so created, the statute stepped in and vested the title in the cestui que use, who thus obtained title by force of the statute and not by force of any feoffment or conveyance under the common law. It therefore became competent for the feoffor to make future limitations unhampered by the technical requirements which obtained as to common law estates. This is what is meant by the statement frequently found in the books, that the use was introduced into the common law. Where the estate limited by way of use conform to the rules of the common law, the cestui que use had at once by force of the statute the same legal estate as he would have had if the limitations had been made by a common law conveyance. Even if the uses were contingent, they were immediately executed by the statute.⁶

Shifting and Springing Uses

116. Where, however, the limitation was such that it did not conform to the rules of the common law, the case was different. There was no legal estate to correspond to the executed use. Although the cestui que use had in theory a legal title, his estate was called a use. These uses were of two kinds: springing and shifting. When the use cut short another estate granted, it was called a shifting use, and when it cut short the estate of the person making the limitation, it was called a springing use.⁷ As the statute operates on a devise to uses,⁸ a shifting use may be created by will as well as by deed. Since a springing use cuts short the estate of the person granting it, it obviously can be created only by a deed inter vivos.⁹ Springing and shifting uses, therefore, arose under the statute of uses, whereas executory devises and

⁶ See §127, post.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §54.

⁸ See §120, post.

⁹ The remark, therefore, of Penrose,

J., in *Pepper's Est.*, 120 Pa. 235 at 243 (1888), where he called the use, created in that case by will, a springing use, was somewhat inaccurate.

bequests operated at law and were dispositions of legal interests.¹⁰ The term conditional limitation is used to designate shifting uses and executory devises.¹ The language of the judges in Pennsylvania is hopelessly inaccurate in this particular. Equitable limitations are called executory devises; conditional limitations are called conditions, and vice versa. The distinction between these different kinds of estates, however, is clear. It is not very easily borne in mind, and it is perhaps impossible to expect technically accurate language from the judges in the practical everyday work of the courts. The law is perfectly plain, although the point has not come up for decision in Pennsylvania, that springing and shifting uses are indestructible by any disposition or termination of the preceding estate.²

Executory Limitations

117. An executory limitation has been defined as follows: "As a deduction from the foregoing observations, we arrive at the following general definition: an executory limitation is a limitation of a future estate in lands, or of a future interest in chattels, or chattels real, which would be invalid, if made in an assurance at the common law, but which, so far as regards the freehold and inheritance of lands, is valid either in a will or in a conveyance to uses, and, so far as regards chattels or chattels real, is valid in a will or testament."³ This definition does not help us much. It simply says that an executory limitation is a limitation which is invalid in a common law conveyance. The term, therefore, seems to include executory devises and bequests, and springing and shifting uses. While such a general term may be convenient, the author of this book has found no occasion to resort to it.⁴

¹⁰ Challis, *Real Prop.*, 2 ed. (1892), Chap. 14. See particularly p. 156.

¹ Gray, *Restraints on Alien.*, 2 ed. (1895), §22, n. 1. Where the limitation operated to revest the estate in the grantor, if entry made, it was called a condition; see §76 on Conditions.

² Mr. Lewis points out, *Lewis, Perp.*, (1843), Chap. 10, that there was much difference of opinion, after the passage of the statute of uses, as to whether

future uses were indestructible. The learning on this point is obsolete, as it is now settled they are indestructible. See Gray, *Rule Perp.*, 2 ed. (1906), §§124-147.

³ Challis, *Real Prop.*, 2 ed. (1892), p. 161.

⁴ For definition of an executory devise, see §78, ante; for definition of shifting and springing uses, see §116, supra.

General Principle as to the Application of the Statute

119. The statute applies to a use but not to a trust.⁵ A special trust or duty was something different from a use before the statute, and the statute is, by its terms, expressly confined to uses. A use existed where the feoffee to uses had no duties to perform.⁶ A trust was where the feoffee had active duties.⁷ The same rule obtains today. It is, of course, a question of intention whether a trust or a use is created in any given case. That intention must first be ascertained and then the statute applied or not, as the case may be. There is a certain fallacy in the assumption⁸ that the statute cannot operate where there are active duties, because it would be contrary to the manifest intention of the donor to give the cestui que use the legal title. The statute is a positive act defeating intention; how, therefore, can it be said that its operation can be defeated by the addition of a few other words indicating an intention that the statute should not apply?⁹ To say that it is a question of intention whether the statute applies, is to put the cart before the horse. The application of the statute will next be discussed with reference to the different instances of the use which may arise.

Devise to Uses

120. The case of a devise to uses was supposed to be an exception because the Statute of Wills¹⁰ was not passed until after the Statute of Uses, and it was much debated whether the former applied to wills. It seems, however, to have been finally settled that it did apply,¹ and such is undoubtedly the law in Pennsylvania, although the point seems never to have been decided.²

⁵ "An equitable interest not a use, within the statute, may with propriety be called a trust." Saunders, Uses, Vol. 1, p. 2 (1823).

⁶ See §109, ante. The proper words for a use were "to permit and suffer the said C. to take and receive the rents."

⁷ See §110, ante.

⁸ Made by Kennedy, J., in Ashhurst v. Given, 5 W. & S. 323 at 328 (1843).

⁹ If this is accurate, the settlor can, by adding to the settlement the words "I intend that the statute shall not

apply," defeat its operation. To state such a proposition is to refute it.

¹⁰ 32, Henry VIII. c. 1 (1540).

¹ Saunders, Uses, Vol. 1, (1823), p. 241; Sugden on Powers, Vol. 1, 8 ed. (1861), p. 148.

² Mr. Chief Justice Gibson, in the case of Roes v. Barclay, 18 Pa. 179 at 183 (1851), after pointing out that a devise was a species of conveyance, said that a trust of land created by will is of the same stamp as a trust created by deed.

Use Upon a Use

121. Where a feoffment was made to A. to the use of B., to the use of C., the second use to C. was void before the statute, because the second use was repugnant to the first, and the two could not stand together.³ The statute, therefore, could not apply to the second use because it was first void by the principles of chancery, and the statute never had a chance to affect it.⁴ Since, therefore, the first use was executed by the statute, and the subsequent use void anyhow, the result was that there could be no use of land created at all. This was the law for nearly a hundred years until, in the early part of the seventeenth century, the court of chancery recognized the second use⁵ as a distinct valid equitable limitation. When the second use was finally recognized, it was held that the statute did not apply. The second use was recognized as a means of giving the court of chancery jurisdiction to prevent a faithless donee to uses from running away with property which had been given to him in confidence. This is the same reason which lay at the foundation of recognition by the court of chancery of the use in the first instance. It has been said⁶ that in Pennsylvania the statute executes the second use, the law differing, therefore, from that which obtains elsewhere. No authority for the statement has been found and there is a dictum to the contrary.⁷ It is believed, however, that the better opinion is that the statute does not apply to the second use in Pennsylvania.

Use in a Pennsylvania Conveyance

122. A use limited to A. on an ordinary Pennsylvania conveyance to B. is executed by the statute. It might be supposed⁸ that the use to A. is not executed, because the

³ Ames, "The Origin of Uses and Trusts," 21 Harv. Law Rev., (1908), at 270-271. Saunders, *Uses*, Vol. 1, p. 228 (1823).

⁴ Tyrrel's case, Dyer, 155 (1557); Doed. Lloyd v. Passingham, 6 B. & C. 305 (1827); Gray, *Cases on Property*, Vol. 1, pp. 510 and 516, respectively.

⁵ Mr. Ames says, 21 Harv. Law Rev. (1908), p. 273, that the first instance of a use upon a use was in 1605.

⁶ Gray, *Restraints on Alienation*, 2 ed. (1895), §215, and Lowrie, J., in *Kuhn v. Newman*, 26 Pa. 227 at 237 (1856).

⁷ Kennedy, J., in *Franciscus v. Reigart*

⁴ Watts, 98 at 118 (1835).

⁸ As was done by Kennedy, J., in *Franciscus v. Reigart*, 4 Watts, 98 at 118 (1835).

habendum contains the words "unto and to the use of B." and that there is, therefore, a use upon a use. The statute, however, only applies to the chancery use, which necessarily implies a relation between two persons. The use to B. does not come within this definition, and the statute does not apply.⁹ The use to B. is introduced to rebut the presumption of a resulting use, which presumption formerly obtained when there was no declaration or consideration paid,¹⁰ and is probably unnecessary at the present time.

Use of Personal Property

123. The overwhelming weight of authority elsewhere is that the statute of uses does not apply to personal property.¹ The law in Pennsylvania is in doubt.² There are, in Pennsylvania, numerous cases³ in which, in construing limitations of personal property, the court has considered the trust as saved from extinction because it was active, and used terms only proper when the question of the application of the statute is under discussion, and yet in many of these cases,⁴ the court made an order for the transfer of the legal title which was totally unnecessary if the statute applied, as the effect of the statute is to vest the title in the cestui que trust immediately without any conveyance. Since the title to personal property passes only by delivery or some agreement between the parties, from which the court can say that it was their intention that the title should pass, it is apparent that to apply the statute

⁹ Ames, 21 Harv. Law Rev., (1908), 270.

¹⁰ Williams, Real Prop., 6th Amer. ed. (1886), p. 187.

¹ Hill on Trustees, Bispham's (1867), p. 366, note 2; Perry on Trusts, 5 ed. (1899), Vol. 1, §311; Bacon on Uses, Rowe's ed. (1804), p. 43; Saunders on Uses, Vol. 1, p. 231 (1823).

² There is a dictum that the statute does not apply to personal property; Rhone, P. J., in Sharp's Est., 155 Pa. 289 at 294 (1893), citing Perry on Trusts, Vol. 1, §311. Mr. Gray, Restraints on Alienation, 2 ed. (1895), §§124g and 215, and Lowrie, J., in Kuhn v. Newman, 26 Pa. 227 at 231 (1856), express an opinion otherwise.

³ E. g., Bacon's App., 57 Pa. 504 (1868); Freedley's App., 60 Pa. 344 (1869); Yarnall's App., 70 Pa. 335 (1872); Deibert's App., 78 Pa. 296 (1875); Keene's Est., 81 Pa. 133 (1876); Osborne v. Soley, 81½ Pa. 312 (1876); Kreamer's Executors v. Showalter, 1 Pa. C. C. 453 (1886); Harbester's Est., 133 Pa. 351 (1890); Fetherman's Est., 181 Pa. 349 (1897); Krebs's Est., 184 Pa. 222 (1898); Eshbach's Est., 197 Pa. 153 (1900); West's Est., 214 Pa. 35 (1906).

⁴ Koenig's App., 57 Pa. 352 (1868); Ogden's App., 70 Pa. 501 (1872); Arnold v. Harper, 4 Sadler's Cases, 126 (1886).

to personal property will give it an effect totally at variance with the received notions and practice on the subject. In the case of real estate, when the statute applies, the cestui que use may at once deal with the property as his own as to third parties. No case has been found in which a similar principle has been applied as to personal property.⁵ There are a great many cases in which the presence of active duties is dwelt upon, in which it does not appear what the nature of the property was.⁶ The ground of decision in some cases of personal property appears to have been that the trust was dry and executed.⁷ In this condition of the cases, no statement as to the law can be ventured. It will be observed that no case has been found which expressly decides that the statute does apply to personal property, and reason and authority are in favor of the proposition that it does not apply. If the statute does not apply to personal property, all the uses of personal property are the same as trusts. If the statute does apply, the same distinction must be taken in considering limitations of personal property, as to whether the trust is active or dry, as is taken in considering a use of real estate.

Residuary Clause

124. Where real and personal property pass under the same residuary clause, there is some doubt as to how far the language should be construed differently with respect to each kind of property.⁸ The true principle is illustrated by the

⁵ If a man died possessed of a mortgage, judgment or silver service, no one would argue that because he bequeathed such property to A. in trust for B., that B. was immediately possessed of the legal title and could satisfy the mortgage or judgment or be entitled to bring replevin for the silver service. In all these cases, the title would vest in the trustee named in the will, and he would have to transfer the title to or hand the article to the beneficiary. It is no answer to this to say that the executor must take the personal property in order to pay the debts, for land is subject to debts as well as personal property, and the liability for debts does not interfere

with the operation of the statute of uses. The cestui que trust has the title vested in him by the force of the statute, subject to the debts.

⁶ For instance, see *Boyd's Est.*, 199 Pa. 487 (1901); *Shower's Est.*, 211 Pa. 257 (1905), and many others might be cited.

⁷ *McCune v. Baker*, 155 Pa. 503 (1893). The decision was correct as there was a trust of an absolute interest, see §§515-517, post.

⁸ See language of *Duncan, J.*, in *Deihl v. King*, 6 S. & R. 29 at 30 (1820), and in *Steele v. Thompson*, 14 S. & R. 84 at 101 (1826).

case of Smith's Appeal,⁹ and the two kinds of property should be dealt with separately. The common practice of failing to distinguish between the two kinds of property is illustrated by several cases.¹⁰ In most cases neither the reporter nor the court thinks it necessary to indicate what the subject matter of the gift is.

Conversion

125. The doctrine of conversion depends on the circumstance that the parties entitled to the proceeds can compel a sale. If the statute applied, it would defeat that right, as the executor would be deprived of the legal title and consequently of the power to make the sale. The direction to sell seems to make the trust active. As soon as the sale is made, the proceeds are personal property, apart from the doctrine of conversion, to which the statute would not on principle apply.¹ When the parties agree to reconvert and dispense with the sale, the power of the executor is at an end. There seems to be some force in the argument that in this case the statute applies and gives the cestui que trust at once the title. No authority for the proposition has been found, and it would undoubtedly be safer to have a conveyance of the legal title, and such, probably, is the prevailing practice.

Use For a Minor

126. Where the cestui que use is a minor, the legal title would be executed in him just the same, as the statute contains no exception in favor of minority, and there is no reason at common law why an infant cannot take title to real estate. In some cases, however, the courts seem to think that the trust would not be executed until the cestui que use arrived at majority,² and it has been said that if there are active duties during minority, the statute does not apply during that time, but when the minor comes of age, the use is executed and the legal title passes to him at once.³ There is no reason why

⁹ 23 Pa. 9 (1854). See also language of Penrose, J., in Francis's Est., 17 Pa. C. C. 163 at 165 (1895).

¹⁰ Moorhead Est., 180 Pa. 119 (1897).

¹ See Koenig's App., 57 Pa. 352 (1868), where there was a conversion and a sale, yet the court seemed to think that the activity of the trust was material.

² Dictum Cable v. Cable, 146 Pa. 451 (1892); Mitchell, J., at p. 455 said that the trust was executed on the majority of the cestui que use, if not before; see Jeremy's Est., 178 Pa. 477 (1896).

³ Mark v. Mark, 9 Watts, 410 (1840); Dictum Black, J., in Steacy v. Rice, 27 Pa. 75 at 81 (1856).

the operation of the statute should be suspended merely because the cestui que use is a minor. A guardian can be appointed, if necessary, to take care of the property and collect the rents until the cestui que use comes of age.

Contingent Use

127. It was at first thought that a contingent use was not executed by the statute pending the contingency.⁴ Mr. Sugden, however,⁵ goes thoroughly into the notion and explodes the theory that a contingent use is not executed. The weight of authority in Pennsylvania is to the effect that the contingent use is executed by the statute.⁶ There are, however, some cases and expressions to the contrary,⁷ which may be considered as overruled by the other authorities, although the conflict does not appear to have been called to the attention of the Supreme Court or the point ever argued. In some cases contingent uses in personal property have been said to be executed.⁸ If the statute does not apply to personal property,⁹ these cases are open to grave objection. The case of a contingent use which commonly arises is that of a use after the termination of an active trust, which is discussed in the next section.

After Termination of the Active Trust

123. The statute applies to the uses which take effect upon the termination of the active trust.¹⁰ The ordinary instance of this class of cases is where the trust for life is terminated and the property becomes vested in those in remainder. The existence in the trustee of a power to sell and make partition

⁴ Saunders, Uses, Vol. 1, p. 231 (1823).

⁵ Sugden, Powers, Vol. 1, p. 18 et seq., 8 ed. (1861).

⁶ See cases cited in §123, post.

⁷ Sharswood, J., in *Rife v. Geyer*, 59 Pa. 393 at 397 (1868), said that they are executed when vested. *Pratt v. McCawley*, 20 Pa. 264 (1853), was a case of a settlement by a woman on the eve of her marriage, in trust for her separate use for life and after her death to convey the same in trust for her children. She died, and the conveyance was made upon active trusts for the children for life, and after their death to convey to their appointees by will. The court held, in a controversy over the validity

of a mortgage given by one of the sons during his lifetime, that the whole estate was equitable. Accord *Morton's Est.*, 24 Super. Ct. 246 (1904). *Kennedy, J.*, in *Ashhurst v. Given*, 5 W. & S. 323 at 328 (1843), said that the statute did not apply where there was no cestui que use in being to whom the possession could be transferred.

⁸ E. g., *West's Est.*, 214 Pa. 35 (1906).

⁹ See §123, ante, on a use of personal property.

¹⁰ As to what is an active trust, see §110, ante. No question has ever been raised as to a vested use. For a discussion of the case of a contingent use see §127, ante.

does not prevent the operation of the statute,¹ and where there is a direction to convey at the termination of the life estate, the statute applies.² Where, however, there is a discretion to terminate the trust, it has been said that the statute does not apply.³ It seems, however, on principle, that the title should remain in the trustee. It is difficult to see how he can sell, make partition or convey unless he has the legal title. The law on this point is far from clear.

The Sole and Separate Use

129. The statute does not apply to the sole and separate use,⁴ even though there are no active duties in the trust.

¹ *Dodson v. Ball*, 60 Pa. 492 (1869); *Chamberlain v. Maynes*, 180 Pa. 39 (1897). In this case there was a vested remainder which became executed, if at all, immediately upon the execution of the trust, and not after the termination of the life estate, as argued by the counsel for the appellee. One of the remaindermen conveyed, and it was held that her grantee could maintain ejectment against the other remaindermen. If this was considered as a legal title, the reasoning of the court was confusing. To say that the statute executed the use, and that the power vested in the trustee to make partition could not prevail as against the cestui que trust who wished to terminate the trust, is correct, but in no case could the vesting of the legal title depend on whether the cestui que trust chose to treat it as in her. It would be in her either by force of the statute or by force of the conveyance from the trustee, and in no other way. The learned judge, Mitchell, J., seemed to think that the remainderman or woman or her grantee, had a title which was available in ejectment without a deed. If this is so, why say that she took the title without the deed? See, however, *Smilie's Est.*, 22 Pa. 130 (1853).

² *Bacon's App.*, 57 Pa. 504 at 512 (1868); *Earp's App.*, 75 Pa. 119 (1874), point not discussed here, decision not sustainable on any other ground; *Armstrong's Est.*, 9 W. N. C. 289 (1880); *Gray, Restraints on Alien.*, 2 ed. (1895), §216. The remarks of Penrose, J., in *Snyder's Est.*, 180 Pa. 70 (1897), were dicta, for an equitable interest could vest and pass under the intestate laws as well as a legal interest could. Contra: *Rice, P. J.*, in *Rockhill's Est.*, 29 Super. Ct. 28 at 35 (1905). The learned judge, however, does not mention the statute of uses, and his language seems unnecessarily restricted to the case of a will.

³ *Paxson, J.*, in *Wallace v. Denig*, 152 Pa. 251 (1893); see *Bank v. Denig*, 131 Pa. 241 (1889), and *Wilson v. Denig*, 166 Pa. 29 (1895). See, however, remarks of *Rice, P. J.*, in *Rockhill's Est.*, 29 Super. Ct. 28 at 35, 36 (1905).

⁴ The clause of sole and separate use originally was "to permit and suffer the cestui que trust to receive and take the rents" for her sole and separate use, etc.; *Pullen v. Rianhard*, 1 Whart. 514 (1836); *Dodson v. Ball*, 60 Pa. 492 (1869). It was not until modern times that the words of activity, such as "to receive and collect the income" were inserted.

tee.⁵ The sole and separate use clause standing by itself does not necessarily prevent the operation of the statute of uses, since the incidents of the separate estate in equity can easily be carried over into the common law in the same manner as were the other peculiar incidents of the use. Since, however, the chief protection to the woman lay in the presence of the trustee to stand between her and the importunities of her husband, an application of the statute would have left her a free agent at law, and defenceless against his influence. Various reasons have been assigned for the non-application of the statute, but this is the principle underlying all of them.⁶ Where the circumstances requisite to the validity of the sole and separate use have ceased to exist,⁷ the statute applies and the beneficiary becomes immediately seised of the legal title, and entitled to deal with it as her own,⁸ and her life estate will unite with the legal remainders, under the rule in *Shelly's case*.⁹ If the active duties, however, have reference to some other object, or there is some other reason for continuing the trust, the termination of the sole and separate use will not entitle the cestui que trust to call for a conveyance,¹⁰ unless she has a fee simple estate, in which case she is entitled to a conveyance, as the trust is a restraint on her absolute ownership.¹ In a number of cases where there was an active trust,

⁵ *Lancaster v. Dolan*, 1 Rawls, 231 (1829), language of Gibson, C. J., at 247; *Pullen v. Rianhard*, 1 Whart. 514 (1836); *Cochran v. O'Hern*, 4 W. & S. 95 (1842) dictum. For a case where there were no words of separate use, and it was held that the statute applied, see *Kinsel v. Ramey*, 87 Pa. 248 (1878). The dictum contra in *Carson v. Fuhs*, 131 Pa. 256 (1889), may be disregarded.

⁶ *Grier, J.*, in *Cochran v. O'Hern*, 4 W. & S. 95 at 96 (1842); *Lowrie, J.*, in *Kuhn v. Newman*, 26 Pa. 227 at 231 (1856).

⁷ As to what these circumstances are, see §570, post.

⁸ *Smith v. Starr*, 3 Whart. 62 (1838); *Stacey v. Rice*, 27 Pa. 75 (1856); *McKee v. McKinley*, 33 Pa. 92 (1859). See §571, post.

⁹ *Stacey v. Rice*, 27 Pa. 75 (1856); *Nice's App.*, 50 Pa. 143 (1865). The decision contra in *Harris v. McElroy*, 45 Pa. 216 (1863), may be considered

as overruled. *Dodson v. Ball*, 60 Pa. 492 (1869); *Tucker's App.*, 75 Pa. 354 (1874).

¹⁰ *Ash's App.*, 80 Pa. 497 (1876); *Delbert's App.*, No. 1, 83 Pa. 462 (1877); *Dunn's App.*, 85 Pa. 94 (1877); *Ingersoll's App.*, 86 Pa. 240 (1878), reversing 2 W. N. C. 13. Her life estate will not unite with the legal remainders; *Earp's App.*, 75 Pa. 119 (1874); *Ashhurst's App.*, 77 Pa. 464 (1875). The court will sometimes construe the active duties to relate solely to the sole and separate use, and not to the life estate. See *Megargee v. Naglee*, 64 Pa. 216 (1870).

¹ See §516, post; *Megargee v. Naglee*, 64 Pa. 216 (1870). The court said in this case that the trust fell, but nevertheless directed a conveyance. The trust would remain until the cestui que trust chose to call for a conveyance; see §525, post. If the reasoning of the court,

the court has said that the statute applied when the sole and separate use came to an end.³ No conclusion as to the law can be drawn from these cases. The author has discovered no principle upon which they can be reconciled, and the remarks of the judges shed no light on the question whatsoever. It is submitted that on principle the law should be as follows: the circumstances requisite under the peculiar doctrine of Pennsylvania law to the validity of the sole and separate use must be present to defeat the operation of the statute. When those circumstances have ceased to exist, the statute at once applies when there are no other active duties. Where there are active duties, the statute does not apply, and the right of the cestui que trust to have a conveyance depends on whether she has a fee or a life estate. The trust only falls of itself in those cases where the statute applies; in other cases, the trust remains until the cestui que trust calls for a conveyance.

Charitable Use

130. The effect of the statute of uses on a charitable use is not clear. In those cases where the cestui que use is indefinite, there would seem to be a practical bar to the operation of the statute, as there is no one to take the legal title.³ It seems that this is the case of a special trust, as the trustee has active and special duties to perform, to wit, to select the cestui que trust. It is true that the statute executes a contingent use. This case presents, however, no greater difficulty than that which exists in the case of a contingent legal remainder at law; whereas, in the case of an indefinite charitable cestui que trust, there is not, and never can be, anyone to take the legal title. Where there is a use for a definite charitable object, there is no difficulty and the statute executes the use in the cestui que use.⁴

that the statute applied, had been correct, there would have been no conveyance decreed, as the title would have passed by force of the statute. See also *Chadwick v. McCombs*, 4 *Sadler's Cases*, 121 (1886).

³ *Strong, J.*, in *Kay v. Scates*, 37 Pa. 31 at 38, 39 (1860); *Strong, J.*, in *Koenig's App.*, 57 Pa. 352 at 355 (1868), there was a conversion here, see §125, ante; *Agnew, J.*, in *Megargee v. Naglee*, 64 Pa. 216 at 218 (1870).

³ This was probably the result in *Henderson v. Hunter*, 59 Pa. 335 (1868), although the point was not discussed, and in *Funck's Est.*, 16 Super. Ct. 434 (1901). Where there was a direct gift at law to a charity, the gift could not take effect, and was administered by the chancellor under the sign manual. See Chap. 26, on Gifts to Charities.

⁴ *App. of St. Luke's Church*, 1 Walk. 283 (1863). Where, however, there was

Clause Against Alienation—Spendthrift Trust

131. The clause against alienation, if valid at all, can affect a legal title as well as an equitable title. There is nothing, therefore, in the clause itself when attached to a bare use to prevent the application of the statute.⁵ Since, however, the clause is perhaps valid in equity, when it would be void at law, the Supreme Court has said that the clause prevents the operation of the statute, as it is necessary to support the use as a trust in order to keep the title of the beneficiary in equity where the restraint imposed will be upheld, and as this cannot be done without the legal title remaining in the trustee, it is necessary for him to retain it, and consequently the clause creates an active trust when attached to a life estate.⁶ It is not very clear, therefore, what the law in Pennsylvania is, and the statement may perhaps be ventured that the clause, when attached to a life estate, will prevent the operation of the statute. There is, it is apprehended, a fallacy in this view of the case. The upholding of the clause in equity when it would be void at law, is a case where equity does not follow the law. There must, therefore, be an equitable limitation first present before the court can say that the clause is valid. The question whether there is an equitable limitation where the subject matter is real estate, depends on the non-application of the statute of uses. To say, therefore, that the statute does not apply where a clause is present, is to defeat

a use for a county, the court seemed to think that the county had the equitable estate: *Seebold v. Shitler*, 34 Pa. 133 (1859).

⁵ It is the general practice in Pennsylvania, in drawing settlements and wills, to engraft the restraint against alienation on trusts which would be valid for some other reason. The case, therefore, where the clause stands alone, rarely arises.

⁶ *Rife v. Geyer*, 59 Pa. 393 (1868), stated §314, post, *semble*, Gray, *Restraints on Alien.*, 2 ed. (1895), §231, observes that the remarks in this case as to spendthrift trusts were dicta, as there was an equitable life estate and legal remainder which could not unite under the rule in *Shelly's case*. The question whether

there was an equitable life estate, however, depended on whether the statute of uses applied. The court said that the words of the will were such that without the clause, the statute would apply. This is objectionable; there was plainly an active trust; see §133, post, n. 3. The court based the decision on the ground that the clause against alienation prevented the operation of the statute of uses. It seems, therefore, that the clause against alienation was the express ground of decision, although not necessarily involved in the case. *Phila. Trust Co. v. Guillou*, 100 Pa. 254 (1882), *semble*; see §315, post, as to this case. *Carmichael v. Thompson*, 8 *Sadler's Cases*, 120 (1886), s. c., 122 Pa. 478 (1888).

the provision of a positive act of the legislature by the interposition of an equitable doctrine which, strictly speaking, cannot prevail except where the statute does not apply. This view of the question does not seem to have been called to the attention of the Supreme Court.⁷ Where, however, the interest was in fee, the court held, as under the law as it stood at that time, the clause was invalid in equity,⁸ that it did not prevent the operation of the statute.⁹

The Modern Use

132. A use may be created as well today as before the passage of the statute of uses, and is called a passive or a dry trust. It only remains to collect a few instances of a use or dry trust.¹⁰ A trust to permit and suffer the cestui que use to take the rents and profits, is unquestionably a dry trust. This was the form in which the ancient use was gen-

⁷ These remarks would also apply to the sole and separate use except that there is an absolute necessity for the trust to be active, as the chief benefit to the woman is in the interposition of the trustee between herself and the importunities of her husband. The chancellor, therefore, laid down the doctrine that the sole and separate use was an active trust. The doctrine as to the clause against alienation has grown up in the last century, and the *sine qua non* of its validity is the existence of a trust.

⁸ As to the present state of the law on this point, see §251, post.

⁹ *Keyser's App.*, 57 Pa., 236 (1868), stated §246, post, where the court held that all the active duties imposed by the will had been accomplished, and the only question remaining was whether the clause prevented the operation of the statute, and it was held that it did not, the interest of the cestui que trust being in fee. The reasoning of the court was that as the intention to tie up the equitable fee was against the law, and that there was a dry trust, no other reason remained to oppose the statute and

the use was executed. It is believed that there was ample evidence of the testator's intention that the title should remain in the trustees, and that therefore, the statute did not apply, but granted this, the son should call for a conveyance because the attempted restraint of a fee was invalid; see §524, post, and he, as the party entitled, could terminate the trust and take in his own control what was his own.

¹⁰ The mere use of the words "in trust" creates a use, and the statute applies; *Eckels v. Stewart*, 53 Pa. 460 (1866); *List v. Rodney*, 83 Pa. 483 (1877), *semble*; *Kinsel v. Ramey*, 87 Pa. 248 (1878); *Warn v. Brown*, 102 Pa. 347 (1883); *Cable v. Cable*, 146 Pa. 451 (1892); *Jeremy's Est.*, 178 Pa. 477 (1896); *Darrah v. Darrah*, 202 Pa. 492 (1902); *Rohrbach v. Sanders*, 212 Pa. 636 (1905), *semble*, see remarks of Fell, J., at top of p. 641; and the application of the statute is not defeated by a direction to the trustee to make a conveyance in accordance with an executory limitation; *Armstrong's Est.*, 9 W. N. C., 289 (1890).

erally worded. The phrase is utterly out of place in any case where it is desired to create an active trust, and if inserted in such a settlement, would, it is conceived, have no legal significance whatever.¹

Trusts

133. The statute of uses does not apply to a trust. A trust is a use with active duties.² The activity of a trust, accurately speaking, is only of importance in an inquiry as to the application of the statute of uses, where the subject matter is real estate and is of no importance or relevancy for any other purpose. The usual words of activity are, "to collect the rents" or "collect and pay over the income."³ There are a few dicta that the words do not prevent the application of the statute.⁴ It is submitted that the weight of authority and reason is with the former view, and that the words are sufficient to prevent the application of the statute. A devise to trustees in trust to pay debts and legacies is generally

¹ See *Rife v. Geyer*, 59 Pa. 393 (1868), stated §314, post; *Dodson v. Ball*, 60 Pa. 492 (1869); *Phila. Trust Co. v. Guillou*, 100 Pa. 254 (1882), stated §315, post.

² For definition of an active trust, see §110, ante.

³ In these cases the court has held that such a clause made the trust active and the statute did not apply. *Rush v. Lewis*, 21 Pa. 72 (1835), *semble*, *Black, C. J.*; *Vaux v. Parke*, 7 W. & S. 19 (1844), dictum; *Pratt v. McCawley*, 20 Pa. 264 (1853); *Barnett's App.*, 46 Pa. 392 (1864), doubtful whether real estate was involved here; *Shankland's App.*, 47 Pa. 113 (1864); *Sheets' Est.*, 52 Pa. 257 (1866); *Bacon's App.*, 57 Pa. 504 (1868); *Earp's App.*, 75 Pa. 119 (1874); *Ashhurst's App.*, 77 Pa. 464 (1875); *McIntosh's Est.*, 158 Pa. 528 (1893); *Boyd's Est.*, 199 Pa. 487 (1901).

⁴ *Gray, Restraints on Alien.*, 2 ed. (1895), §216, citing the case of *Rife v. Geyer*, 59 Pa. 393 (1868). In that case, however, the court ignored the words "recover and receive the rents and income," and placed the case on the ground of the

presence of the clause against alienation. Dictum, *Lowrie, J.*, in *Kuhn v. Newman*, 26 Pa. 227 at 231 (1856), *Harkinson v. Bacon*, 3 W. N. C., 403 (1877). In *Hemphill's Est.*, 180 Pa. 95 (1897), the court said that because there was a direction to pay the net income, there was an active trust, as it necessarily involved discretion. This is undoubtedly correct. Judge Ashman, however, in the court below, took the distinction that there can be no active trust in Pennsylvania unless the duties imposed on the trustee require discretion as well as activity. This is a new thought in the construction of the statute of uses, and one which, it is believed, the cases do not sustain. Judge Ashman further said, "The automatic function of merely receiving for the cestui que trust and immediately paying over to him the trust fund or its income, will not make a trust active. The cestui que trust could perform the act as well, and he has no protection in the superior judgment of the trustee, because the trustee is not empowered to exercise his judgment. The cases

considered as active in Pennsylvania, although no case deciding the point has been found.⁵ It frequently happens that there is a power in trust or a power in an executor, and a question arises as to whether the legal title is in the trustee, in the executor or in the heir or devisee. The answer to this question depends on the terms of the will and the law of powers. The statute of uses obviously has no bearing on the case at all.

General Principle as to Necessity for a Conveyance

135. It seems plain that in all cases which are within the statute, there is no necessity for a conveyance, since the statute of itself passes the title into the cestui que trust. To say that a conveyance is necessary, is to deny the effect of the statute.

Law in Pennsylvania as to Necessity for a Conveyance

136. The law in Pennsylvania is far from clear. The remarks of the judges on the point are in conflict. In Bacon's Appeal,⁶ Strong, J., said, speaking of a contingent use: "It is true that we have in some cases decreed conveyances from a trustee to a cestui que trust, when the purpose of a trust has been fulfilled; but this is not because the equitable and legal titles remained apart. It was to dissipate a useless cloud upon the title, and make the property more marketable." In this remark, the learned judge is involved in a contradiction of terms, for if the legal and equitable titles did not remain

properly describe him as a mere conduit." The learned judge overlooked the practical aspect of the case. The receiving and paying of income can never be automatic. An automatic action is one which proceeds of itself without any intelligence or outside agency. The question before the court in that case was evidently as to real estate, and the collection of income of real estate certainly requires discretion as to making leases, repairs, collecting rents and attending to taxes and water rent, all of which duties the trustee has to perform, see §§154, 155, post, because of his ownership of the legal title. The description of a mere conduit applied

to a trustee, applies to those cases where the statute of uses operates. Furthermore, a mere direction to pay over the rents and income does not imply a direction to pay the gross income, which must be the case if the dictum of the learned judge is correct. In *Wolfinger v. Fell*, 195 Pa. 12 (1900), there was a direction to pay the income. The court, McCollum, J., under a misapprehension as to the terms of the will, thought there was a direction to pay the net income, and said the trust was active on the authority of *Hemphill's Est.*

⁵ See Hill, *Trustees*, Bispham's ed. (1867), p. 358.

⁶ 57 Pa. 504 at 513 (1868).

apart, how could there possibly be anything for the trustee to convey? In *Westcott v. Edmunds*,⁷ Agnew, J., said, by way of dictum: "It is very clear that the active duties of the trust under this will ceased at the death of Catharine Hance, the life tenant under the trust; and after that there remained no further duty to be executed by the trustee, but to convey the estate to the persons in remainder. But this, it has been decided, does not continue the trust, the law, in this state, executing the legal title in the remaindermen without the formality of a conveyance. It is true that decrees have been made in such cases, compelling trustees to convey to the person in remainder or to married women after coverture had ceased; but it is said that this is merely to remove the cloud arising from the apparent trust. Whatever might have been the impression as to the necessity of such a decree, it is now clearly settled by authoritative decision that the legal estate vests without a conveyance."⁸ In many cases the court has said that the trust was executed but nevertheless directed a conveyance.⁹ In some cases, the court has dismissed the bill for a conveyance on the ground that the cestui que use already had the legal title under the statute.¹⁰ In other cases where the statute applied, the cestui que use was held to have the legal title without a conveyance, and permitted to deal with

⁷ 68 Pa. 34 at 36 (1871).

⁸ See also remarks of Rice, P. J., in *Rockhill's Est.*, 29 Pa. Super. Ct. 28 at 35, (1905). In the case of *Carson v. Fuhs*, 131 Pa. 256 at 266 (1889), Mr. Chief Justice Paxson said, after stating that the trust was dry: "The trustee, in this case, had no active duties to perform; it is a passive dry trust, with no interest to guard, no rights to protect. In such case, the cestui que trust is entitled to a reconveyance of the legal title; equity will consider that done which ought to be done, and declare the legal title in Mrs. Hamilton." This is a new ground on which to put the operation of the statute of uses, and somewhat inconsistent with the established construction of the act.

⁹ See *Nice's App.*, 50 Pa. 143 (1865);

Keyser's App., 57 Pa. 236 (1868); *Dodson v. Ball*, 60 Pa. 492 (1869); *Megargee v. Naglee*, 64 Pa. 216 (1870); *Ogden's App.*, 70 Pa. 501 (1872); *Rodrigue's App.*, 22 W. N. C. 358 (1888). See Gray, *Restraints on Alien.*, 2 ed. (1895), §§124 g, 194, n.

¹⁰ See *Kuhn v. Newman*, 26 Pa. 227 (1856). This case has been considered revolutionary in the law of trusts. There were no active duties imposed in the trustee. The sole and separate use fell, and the beneficiaries, therefore, became vested with the legal title; see §§131, ante, 137, post. The remarks of the court as to the case before it were correct. The decree for a conveyance was refused, because if they had the title, the decree in partition embraced it, and, of course, no conveyance was necessary. See *Rush v. Lewis*, 21 Pa. 72 (1853).

it as owner.¹ In still other cases, where the life estate came within the statute, it was united with the legal remainder.² If a conveyance is necessary, how could the life estate unite with the remainder until a conveyance had been made? If necessary in one case, it must be necessary in another. It is perhaps the tendency to require a conveyance when the controversy is between the cestui que use and trustee, but when between the cestui que use and third persons, to consider the title as having passed.³

Probable Cause of Confusion in the Law

137. Further confusion has existed on this point because of the failure to bear in mind the distinction between a trust which is executed by the statute, and a trust which can be terminated by the cestui que trust. In the former case, the interest becomes legal at once; in the latter, it does not become legal until the cestui que trust has proceeded in a court of equity for transfer of the title or the trustee has made a conveyance. It is probable that some of the peculiar principles of Pennsylvania law relating to the validity of the sole and separate use,⁴ and the application thereto of the statute of uses,⁵ have arisen because of this misunderstanding of the operation of the statute of uses. As long as the court failed to distinguish between the case where the trust fell of itself because of the operation of the statute of uses, and the case where it was terminable only by a conveyance from the trustee, it was easy to slip into the position that a sole and separate use fell of itself when the circumstances requisite to its validity had ceased to exist.⁶

Fallacious Notion as to the Test of an Active Trust

138. It is sometimes said that where a court of equity would decree a conveyance of the legal title to the cestui que trust, the trust would be considered as executed without a

¹ *Smith v. Starr*, 3 Whart. 62 (1838);
McKee v. McKinley, 33 Pa. 92 (1859);
Cable v. Cable, 146 Pa. 451 (1892);
Chamberlain v. Maynes, 180 Pa. 39
 (1897), *semble*.

² *Stacey v. Rice*, 27 Pa. 75 (1856);
Nice's App., 50 Pa. 143 (1865).

³ *Eckels v. Stewart*, 53 Pa. 460 (1866);
List v. Rodney, 83 Pa. 483 (1877);
Kinsel v. Ramey, 87 Pa. 248 (1878).

⁴ See §570, *post*.

⁵ See §129, *ante*.

⁶ For a further discussion of this point
 see §129, *ante*.

formal conveyance by the trustee.⁷ This is the same thing as saying that no conveyance is necessary where a court of equity would direct a conveyance. Now, the only case where a court of equity will direct a conveyance is where there is an active trust which has terminated or where the trust can be terminated by the cestui que trust under some rule of law. The very case, therefore, in which a court of equity will decree a conveyance, is the case where a conveyance is necessary, and when the title has passed by the force of the statute, the court will not decree a conveyance. The statement, therefore, is clearly fallacious and should be disregarded.

Conclusion as to Pennsylvania Law

139. No statement of the law as to the necessity of a conveyance can be made in this condition of the authorities. It will undoubtedly be safer to always take a conveyance, and that, probably, is the universal practice, which of course practically repeals the statute of uses. The statute is of no vital importance in modern times except in so far as conveying is concerned. It will be easy to confine the operation of the statute to those cases and deny its effect in all other cases. The line of distinction is so clear between the case of a simple use and all other equitable limitations, that no difficulty can arise. If the statute applies and no conveyance is necessary there will often be a practical difficulty in deciding whether, in a given case, there is a use or a trust.⁸

⁷ This notion apparently has its origin in the 4th paragraph of the syllabus of the case of *Rife v. Geyer*, 59 Pa. 393 (1868), which is as follows: "The true test as to a trust being dry or active is, whether equity in Pennsylvania would decree a conveyance of the legal title." Mr. Justice Sharswood, on p. 396, made use of the above language, leaving out that part of the sentence in quotation "as to a trust being dry or active." It is believed, however, that the court did not mean to announce any such statement of law, for the connection in which Mr. Justice Sharswood uses the language above mentioned is to elaborate that part of the opinion which follows the sentence, to wit, as to how such a trust

is to be treated in a common law proceeding, and has no reference to the previous paragraph where he is discussing the distinction between an active and a passive trust. Cited and followed by *Mehard*, P. J., in the court below in *Carmichael v. Thompson*, 8 Sad. Cases, 120 at 125 (1886); *Mitchell*, J., in *Chamberlain v. Maynes*, 180 Pa. 39 (1897).

⁸ It is to be observed, however, that under the Act of June 14, 1836, P. L. 628, §30, the court has power to compel the conveyance by trustees of the legal estate when the trust has become executed or has expired. While this act is not altogether clear, it may be that under its provisions a conveyance is necessary in every case where the statute of uses applies.

CHAPTER 7

TRUSTS

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Preliminary Discussion

146. Most settlements in modern times are made by way of trust. The reason is apparent. More flexibility of disposition can be attained by the creation of the trust than by a

settlement at law, and the presence of the trustee furnishes greater security to the ultimate interests, particularly when the subject matter of the trust is personal property. Consequently, equitable limitations will comprise the larger number of the instances involving the application of the restraining rules,¹ which will be the chief topic of the discussion which is to follow. Some observations on the nature and incidents of the trust, the title and power of the trustee, and the interest of the cestui que trust will be appropriate.² Limitations in trust are comparatively modern, and as respects the application of these rules, the law is, in the State of Pennsylvania, in a condition of uncertainty and development. The conflict between family pride and dishonesty, on the one hand, and morality and democracy, on the other, has been centered in the past over limitations at law. The smoke of the battle has almost cleared so far as legal limitations are concerned, and the law is fairly well settled. The conflict is still going on in Pennsylvania over limitations in trust, and the authorities on many points are in a distressing state of uncertainty. The generally confused condition of equity in Pennsylvania has probably contributed largely to this result.³ It is important to ascertain exactly what these equitable limitations are, so that we may know how to apply the restraining rules of law. The origin of the trust has already been sufficiently noticed.⁴ The nature of a trust will now be discussed.

¹ The rule against perpetuities, the rule forbidding restraints against alienation, and the rule forbidding restraints on enjoyment.

² The law relating to trusts in Pennsylvania is extremely confused. The cases are in great conflict, and the remarks of the judges so obscure that they offer little assistance. But a small part of that unfortunate condition of affairs can be touched on in this book.

³ "It is not the least among the evils of our mixed system that it breeds a confusion of ideas, and consequent uncertainty, as to the rules of equity, and the nature and extent of the relief to be claimed, which would never occur if the suit were viewed as divested of

the dress of an action at common law. Without keeping law and equity as distinct in the mind as they are in practice, where they are administered separately by different tribunals, the principles of the latter can never be fixed or certain. For want of this, an equitable defence is often, with us, an undefinable something, which depends on a confused feeling of equity, but which is referable to no settled rule of a court of chancery." These remarks of Tilghman, C. J., in *Gochenauer v. Cooper*, 8 S. & R. 187 at 191 (1822), are as pertinent today as they were when he wrote them.

⁴ See Chap. 5, on the Ancient Use.

Early Conception of the Nature of a Trust

147. When the use was first introduced, there was no jurisdiction in equity to compel the feoffee to observe the use. The trust or confidence existed between the feoffor and the feoffee, and the confidence was that the feoffee would observe the terms of the trust. The matter rested, as it was said, entirely in the feoffee's conscience. There was the idea of a duty owing from the feoffee to uses to the cestui que use. When equity took jurisdiction the chancellor simply compelled the feoffee to perform this duty. The idea that the use was an estate in land worked itself into the law at an early date, and has remained down to the present time. According to this conception, the title was split up into the use or beneficial interest, which was in the cestui que use, and the legal title, which was in the feoffee to uses. This rather fanciful idea was probably some conceit of the scholastic logic which was rife at that time, and was perhaps a fiction invented in order to lay the ground for the interference of the chancellor.⁵ This notion has persisted until modern times and must be taken account of at several points in our discussion. The theory, however, is inadequate in the case of a trust and breaks down at several points which will be noticed in the next section.

Objections to the Early Notion of the Nature of a Trust

148. When a trustee conveys to a purchaser for value without notice, the latter takes discharged of the estate of the cestui que trust. How is it possible, however, for the trustee to transfer to the purchaser the beneficial interest, which, if the cestui que trust has an estate, is then outstanding in the latter? The cestui que trust loses that beneficial interest immediately upon the transfer. How it is transferred from him to the purchaser has never been explained. Where a trustee by dealing with the trust property increases it or enriches himself, he is, as to such increase or enrichment, a trustee likewise for the cestui que trust. If, however, the theory of the relation is that the equitable estate is in the cestui que trust, then he must likewise have such an estate in this increase. But how does he acquire that estate? Where

⁵ See §107, ante.

is the separation of the beneficial interest from the legal title? The trustee makes no declaration of trust; how, then, does the beneficial interest of the cestui que trust arise? In like manner, in the case of a constructive trust, the jurisdiction exercised by the chancellor does not depend upon any equitable estate in the party defrauded. The party defrauded has transferred the property to the party defrauding, and the former's right to recover depends not on any estate remaining in him, but on the circumstance that he has been defrauded.

True Notion of a Trust Suggested

149. It will be perceived upon reflection that the trust conceived of as a separation of the beneficial interest from the legal title, does not exist. The trust is a duty owing from the trustee to the cestui que trust. It is a right which the cestui que trust may enforce in equity against a particular person requiring him to deal in a particular way with a particular thing, which duty has been previously raised by implication of law or expressed in some way by a previous absolute owner of the thing as to which the duty is sought to be charged. If a trust is a duty, a trustee having the entire estate, legally and beneficially, can sell to a purchaser for value without notice, because the latter, having no knowledge of the duty, is under no obligation to perform. So, also, where the trustee increases the trust estate, such increase belongs, because of his duty as a trustee, to the trustee, and he must therefore include it in his account. The trustee is the absolute owner and dominus of the entire property at law, subject only to the duty designated either by the terms of the trust or raised by implication of law.⁶

Definition of a Trust

150. A modern trust, therefore, may for the purposes of this discussion, be defined as a relation existing between two or more persons with respect to a particular res, and may be distinguished from other relations which may exist by the circumstance that the legal title to property is vested in one person, subject to a duty with respect to that property, in favor of another person which is enforceable solely in equity.

⁶ See §156, post, on operation and effect of a power of sale in a trustee.

Trusts are divided in modern times into the several different classes of express, constructive, and resulting trusts, each class corresponding to the origin of the trustee's duty. With the case of a constructive trust we have no concern. An express trust is where there is an express declaration by the previous owner designating the duty to be performed, and it is to this class of trusts that our discussion will be chiefly directed. How far may the performance of the duty by a trustee violate the rules of law to which we are addressing ourselves? The particulars in which these rules are involved will be more clearly indicated in the ensuing sections which deal with the power of the trustee. Before proceeding with this topic, it will be proper to notice the case of a resulting trust, with which we will frequently have to deal.⁷

Resulting Trust

151. A resulting trust arises when the equitable limitations do not exhaust the entire interest transferred or where the equitable interests, or some of them, cannot take effect because void under some principle of law. In each of these cases, there is a resulting trust *pro tanto*, and on the theory that the interest of the cestui que trust is an estate, the equitable interest will result to the grantor or his heirs in the case of a deed, or to the heirs at law, residuary legatee or next of kin, according to the nature of the property, in the case of a will. There is no intestacy. The entire legal title is disposed of by the testator, and the next of kin do not come in by way of succession.⁸ The chancellor, to prevent an unjust enrichment,

⁷ See §§154-158, *post*.

⁸ As pointed out by Mr. Ames, *The Failure of the Tilden Trust*, 5 Harv. Law Rev., 389 at 392, (1891): "The fallacy of this view is demonstrable with almost mathematical conclusiveness. An intestacy, where everything that the testator had passed by his will, is a self-evident contradiction. * * * If it be said that the legal title passed, but not the equitable interest, the answer is that the absolute owner of the property has no equitable interest. The use of the words 'equitable ownership' and 'equitable estate' is so inveterate among lawyers, that we

do not always remember that these are figurative rather than exact legal terms. An equitable interest is a right in personam. It implies, of necessity, a relation between two persons, known as the trustee and the cestui que trust. In the case of absolute ownership, who is the trustee? An equitable claim by the owner against himself as the holder of the legal title would be an absurdity. Test the matter in another way. Transfer by intestacy is a true succession. The right of the successor is of precisely the same nature as that of his predecessor." The right of the next of kin

decrees a resulting trust according to the rules of law, where the disposition is by deed, to the grantor, if living; to his heirs, if he is deceased.⁹ Where the disposition is by will, the trust will result as follows: if the gift is of a specific legacy or a specific piece of real estate, it will result to the residuary legatee;¹⁰ if the gift is of the residue, it will result to the heir at law or next of kin, according to the nature of the property. The very loose expression, that there is an intestacy, or that the property goes under the intestate law, is frequently found in Pennsylvania.¹ Some space has been devoted to this point because it is important to clear thinking to form an accurate conception of the nature of the equitable interest, and if this principle is kept steadily in view, many difficulties arising in the disposition of property embraced under void limitations will disappear.²

The Title of the Trustee

153. The trustee takes exactly the estate which will pass under the rule of the common law by the conveyance which has been made—nothing more or nothing less, and the quantum of his estate in law cannot be affected in any way by the trusts declared. If a conveyance is made to A. for life, in trust for B. in fee, A. will take nothing more than a life estate.³ The trust of that part of the fee which is more than the life estate, will attach to the title in the grantor, which was not divested by the common law conveyance, and a court of equity will direct him to make such conveyance thereof as will be necessary to carry out the trust which he has

in this connection cannot be anything else than the equitable interest, a claim against the trustee under the will, who has a legal title. The testator never had any such claim against the executor or trustee. "How, then, any intestacy?" See remarks of Lowrie, J., in *Van Rensselaer v. Dunkin*, 24 Pa. 252 at 253 (1855); s. c. sub. nom. *Sill's App.*, 1 Grant's Cases, 235.

⁹ According to the analogy of reversion, see §37, ante.

¹⁰ According to the analogy of the rules applicable to a similar case at law, see §§635, 686, 687, post.

¹ Hanna, P. J., in *Coggins' App.*, 124 Pa. 10 at 15 (1889); Mitchell, J., in *McCurdy's App.*, 124 Pa. 99 at 114 (1889); see *Bell's Est.*, 147 Pa. 389 (1892). In *Johnston's Est.*, 185 Pa. 179 at 182 (1898), Stewart, P. J., in the court below, said that there was an intestacy, and then, that there was a resulting trust.

² Read in this connection, Chap. 10, on disposition of property embraced in a void limitation.

³ *Brink v. Michael*, 31 Pa. 165 (1858); *Warn v. Brown*, 102 Pa. 347 (1883).

declared. The law is the same where the trust is created by will.⁴ Where the trustee takes a life estate only, the balance of the legal title is in the heirs of the testator, and if the equitable estate outlasts the legal title, such conveyance will be directed as is necessary to sustain the trust. If the conveyance or devise is made to A. in fee, in trust for B. for life, the whole title is out of the grantor, and there is a resulting trust of the balance to him.⁵ The common statement in the books is that the trustee takes the title which the parties intended him to take.⁶ It is apprehended, however, that this statement overlooks the real principle involved. The notion is sometimes advanced that where, under the deed or the will, the trustee takes an absolute estate at law, his estate is lessened because the trusts declared do not exhaust the fee.⁷ It is submitted that there is no occasion whatever to reduce the legal estate because of the failure of all or part of the equitable estate. If this notion is correct, there can never be a resulting trust because there will be nothing for the equitable interest to result upon in the hands of the trustee.⁸ In other words, where the deed or will will pass a fee at common law, there is no reason to say that the trustee takes a less estate, because the trusts declared do not exhaust the whole fee.

Preliminary Discussion of the Power of the Trustee

154. The absolute power of the trustee as dominus of the legal title is limited by the duty designated by the terms of

⁴ *Ashhurst v. Given*, 5 W. & S. 323 (1843); *Brown v. Williamson*, 36 Pa. 338 (1860); *Spring's Est.*, 216 Pa. 529 (1907).

⁵ See §151, ante, on Resulting Trusts.

⁶ *Perry on Trusts*, Vol. 1, §312, 5th ed. (1899).

⁷ Sometimes it is phrased in this way: the trustee takes only the estate necessary to carry out the trust declared. See *Gray, Rule Perp.*, 2 ed. (1906), §422a. The remarks, however, of *Agnew, J.*, in *Henderson v. Hunter*, 59 Pa. 335 at 340 (1868), that the legal estate of the trustee had no duration beyond the use it was intended to pro-

tect, must be qualified by the facts of the case before him, which was that of a determinable fee subject to a trust which determined with the legal title. In such case, the legal title would go back to the grantor of itself anyhow. See §27, ante, as to determinable fees.

⁸ This is perhaps the thought in the mind of *Strong, J.*, although rather awkwardly expressed, in *Koenig's App.*, 57 Pa. 352 at 355 (1868), where he said: "It matters not what may be the nominal duration of an estate given by will to a trustee. It continues in equity no longer than the thing sought to be secured by the trust demands."

the trust. He has power, therefore, to perform his duty, and it is inaccurate to say that his power springs from his duty. The power of the trustee may be considered under two heads: (1) that part of his power as dominus which is consistent with his duty as trustee, and which may be called his inherent power, and need not be expressly conferred; (2) that part of the power which is inconsistent with the duty to the cestui que trust, and which may be called a special power, and must be expressly conferred. In each case, the power may be an act with reference to the legal title or with reference to the equitable estate. Powers of a trustee are commonly divided into express powers and implied powers. This division is unscientific because the distinction between the various kinds of powers of a trustee does not depend on whether the powers are expressly conferred or not since many inherent powers are frequently expressly conferred, but on the nature of the power itself. The nature of the power is to be gathered from the act to be done, considered with reference to the terms of the particular trust.⁹ The case of an inherent power will not require any special comment. Where there is a special power, we may distinguish between a power to do an act relating to the legal title, and the power to do an act as to the equitable estate. These may conveniently be called legal powers and equitable powers, respectively.

Powers Over the Legal Title

155. The act may refer to the trust res. If the act is one which will not interfere with the superimposed equitable estate, the power is inherent, as the trustee may do the act anyhow by virtue of his title as dominus of the res.¹⁰ Where the act concerning the trust property will injure the equitable interest, as when the act is a disposition of the trust res, the power is special and must be expressly conferred. The application of the rule against perpetuities to these powers is discussed

⁹ Thus, in a case of a gift to A. in trust to sell Blackacre and divide the proceeds between B. and C., A. would have no power to make a lease, as his primary and particular duty is to sell. The power to lease, therefore, must be expressly conferred. In the case, however, of a gift of Blackacre to A. in trust, to pay the income to B. for life, and

after his death to C. and his heirs, the power to lease would be part of the inherent power and not inconsistent with the duty of the trustee.

¹⁰ Thus, in the ordinary case of a trust settlement, the trustee has power to pay taxes, make ordinary repairs, make leases, etc., without any express authority to that effect.

in Part III.¹ The common instance of this kind of a legal power is the case of a power of sale, a few observations as to which will be introduced in the next section.

Operation and Effect of a Power of Sale in a Trustee

156. The power of sale does not exist at law, because the trustee has the entire legal title and all powers connected therewith. He is incapacitated from dealing with that title only because of the superimposed equitable estate of the cestui que trust. The legal title of the trustee is limited in equity and not at law. If he disposes of the legal title to a purchaser for value without notice, the only remedy of the cestui que trust is against the trustee and the proceeds of the sale. If he disposes to a purchaser for value with notice or without value, the cestui que trust can follow the title and enforce the trust. The trustee, therefore, has power to dispose of the title anyhow. The equitable right does not affect the passing of the title at law. The only effect of a power is to enable the trustee to pass the title to a purchaser with notice free of the trust.²

Powers as to the Equitable Estate

157. The act may be with reference to the equitable interest. We may take the same distinction here as in the discussion of acts referring to the legal title. If the act is something of minor importance, which will not interfere with the equitable interest of the cestui que trust, the power to do it is inherent, and any words purporting to confer it, are superfluous.³ If the act is one which may or necessarily will interfere with, destroy or defeat the estate of the cestui que trust, authority to do it must be expressly conferred, and the authority amounts to a special equitable power. Where the power is to create new equitable estates, as where the trustee is authorized to make advances out of principal or apportion income, the rule against perpetuities is involved.⁴ This is a

¹ See §§415-430, post.

² Confer §149, ante.

³ A trustee has large discretion in the matter of the performance of his duty. Thus, a power in the trustee to pay the income quarterly or monthly, is unnecessary, as he may do either without such power being inserted in the

settlement, see §658, post. Instances of such superfluous powers in trust settlements are not uncommon, and frequently cause difficulties which would have been avoided had they been omitted.

⁴ For a discussion of this point, see §§411-413, post.

power to defeat an equitable estate, because the payment to the beneficiary under the power is necessarily a substitution for the interest originally specified in the trust settlement. Where the power simply authorizes an act which is an interference with the equitable estate specifically designated, the case calls for the application of the rule forbidding restraints on enjoyment.⁵ The question in such case is, how far the trustee will be permitted to proceed under the power when the act amounts to a restraint on use and enjoyment. This question is discussed in Part IV relating to the rule forbidding restraints on enjoyment.

Discretion

158. A discretion is said to be vested in a trustee when the doing of an act with respect to the trust is left to his personal judgment. The discretion amounts to a power to be exercised in the option of the trustee,⁶ and the same classification of the acts to be done under the discretion may be made here as in the case of a power.⁷ A discretion and a discretionary power are the same. The discretion was construed by the Court of Chancery to make the doing of the act personal on the part of the trustee named, and the act, therefore, could not be done by his successor in the trust.⁸ In the case of a discretion to do an act, with reference to the legal title, the discretion has no effect whatever upon the power of the trustee, but simply results in making the power personal to the trustee upon whom it is conferred. Where the discretion is to create new estates, as where the trustee has discretion to advance out of principal, the discretion makes

⁵ Thus, suppose a gift to A. in trust to pay the income to B. for life, with power in the trustee to expend the income entirely in the purchase of automobiles for the use of the cestui que trust. This power will restrain the cestui que trust in his otherwise unlimited use of the income. The cestui que trust may not want an automobile.

⁶ This is so, no matter how worded. All the following phrases mean the same: the trustee to have discretion to sell; the trustee to have full power to sell in his discretion; the trustee to

have discretionary power to sell; the trustee may sell in his discretion. As to the application of the rule against perpetuities to such powers, see §§411-413, post.

⁷ See §154, ante.

⁸ Under the Act of June 14, 1836, P. L. 628, §25, the discretion passes^Δ to the successor appointed by the Court of Common Pleas. *Wilson v. Pennock*, 27 Pa. 238 (1856). For a discussion of discretion in the case of charitable trusts, see Chap. 26.

the power in the trustee absolute, and the cestui que trust has no standing to compel the exercise of the discretion in his favor.⁹ Where, however, the discretion is to do an act interfering with the use and enjoyment by the cestui que trust of his estate, the distinction between a discretion and a power is of some importance, because in this case the cestui que trust will have a more or less protected right to proceed in a court of chancery to compel a performance of the trust, and in such case the act of interference can be more or less successfully performed by the trustee, according to whether he merely has authority to do it or whether it is left entirely to his discretion. The learned reader will recollect that the duty of a trustee is in its nature imperative, and the chancellor will compel him to perform the terms of the trust. If, therefore, the settlor introduces into the trust any phrase which leaves the performance of the whole or any part of that duty in the discretion of the trustee, he to that extent nullifies the imperative duty previously laid down. The discretion is necessarily inconsistent with the idea of absolute duty. The power vested in the trustee may be so large that it is doubtful whether there is any imperative duty or trust created at all. The reconciliation of the conflicting provisions of such a settlement is a question of construction oftentimes of great difficulty. At this point, the line of cases dealing with the question whether a trust is created, and the cases on precatory trusts, have their origin. With these questions we are not concerned.

Trustees to Preserve Contingent Remainders

159. There are many cases in Pennsylvania¹⁰ where the Supreme Court has said there was a trust to preserve contingent remainders. It is important to clearly apprehend what is meant by trusts to preserve contingent remainders. A legal contingent remainder was liable to be destroyed at common law.¹ In order to obviate this danger to the contingent remainder, there was an additional clause inserted in the limitations vesting the title in trustees, to preserve the contingent remainder.² Such trusts were simply attendant upon and existed

⁹ Read Chap. 23 on discretion.

¹⁰ E. g., *Wolffinger v. Fell*, 196 Pa. 12 (1900); *Moore's Est.*, 198 Pa. 611 (1901); *Boyd's Est.*, 199 Pa. 487 (1901).

¹ See §§54-62, ante.

² First invented in the middle of the seventeenth century: *Gray, Rule Perp.*, 2 ed. (1906), §192, n. 3.

side by side with the legal limitations of the settlement, and are unknown in Pennsylvania. A trust to preserve contingent remainders, therefore, has a different meaning with us, if it has any proper meaning at all.³

Trustees to Preserve Contingent Remainders in Pennsylvania

160. A contingent equitable interest and a vested equitable interest stand on the same footing in this respect. In both cases the interest is indestructible because it is the duty of the trustee to pay to the ultimate beneficiary,⁴ and the trust is not at an end until he has made that payment. The life tenant, therefore, cannot in any event have the principal, for the simple reason that the settlor has directed that the principal be paid to some one else. The principal must remain with the trustee as against the ultimate beneficiary, in order to provide for the payment of the income to the life tenant, and as against the life tenant in order to provide for the payment of the principal to the ultimate beneficiary at the expiration of the life estates. To call such a trust, a trust to preserve contingent remainders, is therefore somewhat inaccurate and totally unnecessary. It is no more a trust to preserve the ultimate interests than it is a trust to provide for the intervening life estates; both are equally objects of the donor. Furthermore, the ultimate estates may take effect as vested remainders or as executory devises, and consequently the phrase is entirely too narrow.

Nature of Interest of Cestui Que Trust

161. The interest of the cestui que trust is a chose in action, and should, therefore, on principle, be personal property.

³ For a detailed statement of a settlement upon trusts to preserve contingent remainders, the learned reader is referred to Perry on Trusts, 5th ed. (1899), §§522, 523, adopted from Lewin. The following clause taken from the form of a settlement given in Saunders, Uses, Vol. 2, p. 243 (1823), will illustrate the nature of the trust: "To the use of the said Henry Howard and Henry Hunt and their heirs, during the life of the said Francis Frederick, in trust to support and preserve the contingent uses and the estates hereinafter limited from

being defeated or destroyed; and for that purpose to make entries and bring actions, as occasion may require; but nevertheless to permit and suffer the said Francis Frederick and his assigns, during his life, to receive and take the rents, issues and profits of the premises, to and for his and their own use and benefit; and from and immediately after his decease."

⁴ The rules of the common law have no application here, as to which see §§54-62, ante, on destructibility of contingent remainders.

The conception of the use as an estate in the property still remains in the law,⁵ and accordingly the interest of a cestui que trust is personal property or realty, according to the nature of the subject matter. The interest of the cestui que trust has also been brought within the rules of the common law defining the quantum of the estate. If it is the duty of the trustee to pay the income to A. for life, A. has a life estate. If it is his duty to pay it for ten years, A. has a term of years. If it is his duty, after the death of A., in the case first put, to give the principal to B. and his heirs, B. has an absolute ultimate estate, generally called a remainder, or, more properly speaking, a future trust. On the principle that equity follows the law, the same rules of construction are generally applied to equitable interests as are applied at law to legal interests. The chancellor, however, is more liberal in construing the words of the trust than is a judge in the common law courts. The court will generally construe an interest in equity to be vested or contingent, according to the same rules of construction as would apply if the limitations were legal. As the vesting or non-vesting of an interest is the test of the application of the rule against perpetuities, this principle is of vital importance.⁶ If the cestuis que trustent are the members of a class, the same rules apply as are applicable to the case of gifts to a class at law.⁷ The principles involved in the case where the cestuis que trustent are indefinite, are discussed in Chapter 26, dealing with gifts to charities.

Attributes of the Equitable Estate

162. The equitable interest of the cestui que trust is assignable,⁸ devisable,⁹ descends according to the intestate law,¹⁰ and is subject to involuntary alienation.¹

⁵ See §147, ante.

⁶ See §§328, 329, 360, post.

⁷ See §§67-71, ante, on remainders to a class; see §438, post, on present gifts to a class.

⁸ Saunders, Uses, Vol. 1, p. 1 (1823); see Phillips's Est., (No. 3), 205 Pa. 515 (1903).

⁹ This is plainly the law, but no authority has been found.

¹⁰ Wylie v. Mansley, 132 Pa. 65 (1890);

Shallcross's Est., 200 Pa. 122 (1901).

¹ Creditor must proceed by attachment: Ellwanger v. Moore, 206 Pa. 234 (1903). Is not subject to the lien of a judgment: Handy's Est., 182 Pa. 68 (1897), and creditor must wait until the trust is terminated, when the interest of the cestui que trust is a future trust or a remainder: Foster's Est., 179 Pa. 610 (1897).

Future Trusts

163. When the right of the cestui que trust is limited to arise at some time in the future, there is a future equitable interest, properly called a future trust. The terms executory devise, remainder, or springing or shifting use, are not, accurately speaking, applicable. The language of the judges is very loose, and these technical terms are used interchangeably with great freedom. It is important, however, to bear in mind the exact distinction between them. An equitable estate is continuous just as a legal estate is. The right of the cestui que trust is to be referred to the beginning of the interest, and to be regarded as an integral whole, notwithstanding the fact that there is a continuing duty on the part of the trustee so long as the estate lasts. It seems an unnecessary refinement to split up the estate and give the cestui que trust separate, distinct rights, predicated on each performance of duty by the trustee, even though an arbitrary division of the estate into one-year periods is adopted.²

² A suggestion to this effect is made *Alien.*, 2 ed. (1895), §272a, discussed by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §376, post. §249b, n. 4, and Gray, *Restraints on*

PART II

THE RULE FORBIDDING THE CREATION OF RESTRAINTS ON ALIENATION

Chap. 8. Restraints on Alienation Defined and Analyzed.

LEGAL INTERESTS

Chap. 9. Absolute Interests. Voluntary Alienation.

Chap. 10. Absolute Interests. Involuntary Alienation.

Chap. 11. Estates for life. Voluntary and Involuntary Alienation.

EQUITABLE INTERESTS

Chap. 12. Absolute Interests. Voluntary and Involuntary Alienation.

Chap. 13. Estates for Life. Involuntary Alienation. (Spendthrift Trusts.)

Chap. 14. Estates for Life. Voluntary Alienation.

CHAPTER 8

RESTRAINTS ON ALIENATION DEFINED AND ANALYZED

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The Rule Forbidding the Creation of Restraints on Alienation

171. We have already noticed sufficiently the history of alienation¹ and the principle of public policy which is opposed to the creation of restraints on alienation.² We therefore begin this part of the discussion with the general rule that the donor may not restrict the alienability of the subject matter of the gift in the hands of the donee. This principle of law may be called the rule forbidding the creation of restraints on alienation. We shall in this chapter define and analyze the restraints on alienation, and indicate the order in which the subject will be treated.

Alienation Defined and Analyzed

172. Alienation is the transfer of the title to property from one person to another, and may take place by the act of the party holding the title, in which case it is called voluntary alienation, or it may take place in pursuance of law, without or against the consent of the party holding the title, in which case it is called involuntary alienation. Voluntary alienation occurs by the act of the holder of the title.

¹ Generally at §7, ante; as to real estate, erty, §90, ante.

§§18, 19, 20, ante; as to personal prop- ² §§11, 12, 13, 14, ante.

Involuntary alienation can take place only under some legal process, which may be (1) proceedings in bankruptcy; (2) execution, legal or equitable, to satisfy some decree of the court; (3) under eminent domain proceedings.

Restraints on Alienation Classified

173. The restraint on alienation may be sought to be imposed by a proviso (1) that the title shall go over to a third person upon alienation; (2) that it shall revert to the donor or his heirs on alienation; (3) by a simple prohibition against alienation, in which latter case the title remains in the owner if the prohibition is valid, and he cannot get rid of it nor can it be taken away from him, notwithstanding an attempted alienation. The first two cases produce a forfeiture of the title when the proviso is violated. It is immaterial, for the purposes of this discussion, whether the title goes over to a third person or reverts to the grantor.³ The important distinction is between the clause of forfeiture and the clause of prohibition. The first two cases will therefore be hereafter referred to under the term clause of forfeiture.⁴ A clause of forfeiture or prohibition upon involuntary alienation has no effect whatever upon voluntary alienation, for the holder may dispose of the title before the involuntary alienation occurs, and thus prevent the proviso from taking effect.⁵ In like manner, where the restraint is upon voluntary alienation, the title is subject to involuntary alienation before the voluntary alienation takes place.⁶

Restraint Does Not Affect the Quantum of the Estate

174. The restraint on alienation, however, does not affect the quantum of the estate. In a number of cases, however, where the question was as to the quantum of the estate the

³ See §183, post.

⁴ The clause of forfeiture is very rare in Pennsylvania. For an attempt to impose such a clause, see *Pepper's App.*, 120 Pa. 235 (1888).

⁵ *Stuckert v. Harvey*, 1 Miles, 247 (1836). It is possible to word a clause so that it would take effect, if at all, as to all holders of the title. No such case

appears to have arisen in practice, and it is not likely that its validity would be sustained if it arose. The discussion in the text is limited to the case where a restraint applies to the particular holder of the title.

⁶ *Dictum*, Woodward, J., in *Hill v. Hill*, 43 Pa. 528 at 531 (1862).

court seemed to think it necessary to comment on the validity or invalidity of the clause as bearing on the question of construction.⁷ As the validity or invalidity of the clause is determined largely by the quantum of the estate to which it is attached, the confusion in thought is apparent.

Division of the Subject Which Has Been Adopted

175. Mr. Gray⁸ emphasizes the distinction between forfeiture for alienation and restraints on alienation, and divides his book accordingly, classifying first, forfeiture for alienation, and second, restraints on alienation, in each case with respect to the different estates.⁹ Mr. Gray's arrangement has been modified because of the peculiar condition of the Pennsylvania cases. All legal interests are discussed together, and then equitable interests. This arrangement serves to emphasize the distinction between law and equity, in which Pennsylvania law is particularly weak. The various estates will be discussed under each of these headings, and particular emphasis will be laid on the distinction between voluntary and involuntary alienation. A case of forfeiture for alienation is practically unknown in Pennsylvania, and the law on this point will be briefly noticed in the various chapters. If the subject were distributed under the headings of forfeiture for alienation and restraints on alienation, the disproportion in bulk would be very great, and the other distinctions, of more importance to a student of Pennsylvania law, would perhaps be lost sight of

⁷ *Reifanyder v. Hunter*, 19 Pa. 41 (1852); *McIntyre v. McIntyre*, 123 Pa. 329 (1888); *Sprankle v. Commonwealth*, 2 Walk. 420 (1884); *Brown v. Bonnell*, 4 Walk. 271 (1882).

⁸ *Restraints on Alien.*, 2 ed., Table of Contents.

⁹ These distinctions are based upon a matter of form in expression, and as the majority of cases arise on wills, which are frequently inartificially expressed, it is often difficult to say to which class of restraints on alienation the case in question belongs.

CHAPTER 9

ABSOLUTE LEGAL INTERESTS. VOLUNTARY ALIENATION

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Preliminary Discussion

182. In this chapter we shall discuss restraints on the voluntary alienation of absolute legal interests in realty and personalty. Most of the controversies arise over interests in real property. Attempted restraints on the voluntary alienation of legal interests in personal property are very rare. A prohibition upon voluntary alienation clearly prevents the free circulation of property, and is against the principles of public policy already discussed.¹ A clause of forfeiture has the same effect, because the donee knows that if he attempts to dispose of the property, he will lose it and receive no compensation. It, therefore, has the practical effect of a prohibition of alienation, as he is forced indirectly to keep it against his will. There are several matters which require comment before proceeding to the discussion of the various restraints.

Validity of Clause of Forfeiture to Grantor

183. It has been said that a restraint on the alienation of the fee in the shape of a clause of forfeiture to the grantor is void, because the Statute of Quia Emptores, by prohibiting subinfeudation, put an end to reversionary interests after a

¹ See §§11 and 12, ante.

fee.² There is authority for the proposition that the absence or presence of the reversion is not the test of the validity of the clause of forfeiture to the grantor.³ The validity of a right of re-entry for condition broken has been established in Pennsylvania.⁴ The clause of forfeiture to the grantor upon voluntary alienation is the same as a right of re-entry for condition broken. The invalidity of such a clause seems to depend on the principle of public policy which supports⁵ the rule forbidding restraints on alienation. There is, therefore, no distinction in so far as the application of the rule forbidding the creation of restraints on alienation is concerned, between a clause of forfeiture to the grantor and a clause of forfeiture to a third party.

Validity of Clause of Forfeiture of Contingent Interests Before Vesting

184. Mr. Gray draws a distinction, in this connection, between vested and contingent interests,⁶ and says that a clause of forfeiture on a contingent interest before vesting is valid at common law. As a contingent interest was inalienable at common law, the restraint was, more properly speaking, a restraint on an attempt to do a void act. The omission to attempt to alienate may be a condition precedent to the vesting, and if the clause is so worded, seems to be unobjectionable. As contingent interests are now freely alienable in Pennsylvania, at least by equitable assignment,⁷ and in this respect, therefore, similar to vested interests, there is no occasion to make any distinction in this connection. No case has been found supporting the distinction, and it may perhaps be hoped that the Supreme Court will refuse to disturb the symmetry of the law in this particular.⁸

Clause of Forfeiture of Vested Interests Before Coming Into Possession

185. It is submitted, further, that there is no room for the distinction⁹ that a restraint on alienation of a vested

² Gray, *Restraints on Alien.*, 2 ed. (1895), §20.

³ Gray, *Restraints on Alien.*, 2 ed. (1895), §21.

⁴ See §76, ante.

⁵ Gray, *Restraints on Alien.*, 2 ed. (1895), §21.

⁶ Gray, *Restraints on Alien.*, 2 ed. (1895), §§45-54.

⁷ See §52, ante.

⁸ See, however, dictum of Penrose, J., in *Barker's Est.*, 159 Pa. 518 at 525 (1894).

⁹ Taken by Penrose, J., in *Barker's Estate*, 159 Pa. 518 at 526 (1894).

interest prior to its coming into possession, is valid. No case has been found supporting the proposition, and it is opposed to the general principles upon which the law considers the case where a possession of a vested interest is postponed. The postponing of possession has no effect whatever upon the vested interest, either as respects the application of the rule against perpetuities or as respects alienability or capacity to descend to the heirs of the first taker. Why, then, should the postponing of possession have the effect of making valid a restraint which would be invalid if the time of possession were cotemporaneous with the time of vesting?

Common Law as to Unqualified Restraints on the Voluntary Alienation of an Absolute Legal Interest

187. An unqualified restraint on the voluntary alienation of a legal fee simple interest, whether in the shape of a prohibition or a clause of forfeiture, is void at common law.¹⁰ No Pennsylvania case raising the question of the validity of a clause of forfeiture has been found,¹ but there is no reason why the common law should not prevail. The cases of a prohibition are noticed in the next section.

Pennsylvania Law as to Unqualified Prohibition on the Voluntary Alienation of an Absolute Legal Interest

188. An unqualified prohibition on the voluntary alienation of an absolute legal interest is clearly bad in Pennsylvania, and accordingly, the following clauses of prohibition have been held void: "That my son John shall not have any right nor power to sell nor convey the said farm to any person or persons whomsoever."² "That she shall not alien or dispose of the same, or join in any deed or conveyance with her husband

¹⁰ Gray, *Restraints on Alien.*, 2 ed. (1895), §§12, 13, 19, 105, and cases cited.

¹ There have, however, been two cases of a clause of forfeiture in which the decision was placed on other grounds: *Brothers v. McCurdy*, 36 Pa. 407 (1860), where the limitation over was invalid

because the condition was too indefinite: see this case stated, §195, post; *App. of St. Luke's Church*, 1 Walk., 283 (1863), where the limitation over was held to be remote.

² *Reifsnyder v. Hunter*, 19 Pa. 41 (1852); dictum, however, as the case arose after John's death.

for the transfer thereof during her natural life."³ "Item. It is my will that neither of my children shall sell or convey any part of the real estate hereby willed to them."⁴ "Not to be sold or disposed of by them."⁵

Unfortunate Dictum in Sanders v. Mamolen

189. In *Sanders v. Mamolen*⁶ the court below, in an opinion which was approved on appeal by the Supreme Court, said: "As a restraint of alienation on the grant of a fee is against the general rule of law, it must be construed strictly." In the case in question, the court construed away the restraint, but the language used was unfortunate and lends countenance to the view that such a restraint may be valid. It is not a question of construing the restraint strictly. No matter what the construction is it is void as a matter of law.

³ *Walker v. Vincent*, 19 Pa. 369 (1852); Lowrie, J., said, on page 372: "It makes no difference that the testator has expressly withheld one of the rights essential to a fee simple, for the law does not allow an estate to be granted to a man and his heirs with a restraint on alienation, and frustrates the most clear intention to impose such a restraint, just as it allows alienation of an estate tail, though a contrary intent is manifested. And it would be exceedingly improper in any Court, in construing a devise to a man and his heirs, to endeavor to give effect to the restraint upon alienation by changing the character of the estate to a life estate, with a remainder annexed to it, or with an executory devise over. The law is wise in not consenting to give effect to all the intentions of testators, for if it did, it would not be many generations before all the land of this country would be effectually shackled, so that the generation in possession of it would have but little power over it. To prevent even stray instances of this kind, the rule that avoids all restraints upon grants to a man and his heirs is most valuable in its influence."

⁴ *Naglee's Appeal*, 33 Pa. 89 (1859);

Gray, Restraints on Alien., 2 ed. (1895), §23, considers this as a case of a conditional limitation. It is submitted that it is the case of an attempted prohibition against alienation. This is the same will as was before the Court in *Williams v. Leech*, 28 Pa. 89 (1857).

⁵ *Conrow's Appeal*, 3 Penny. 356 (1883); dictum, *Sharswood, J.*, in *Ingersoll's Appeal*, 86 Pa. 240 (1878); dictum, *Mitchell, J.*, in *Brock v. Steel Co.*, 203 Pa. 249 at 254 (1902). In *Doebler's Appeal*, 64 Pa. 9 (1869), there was a devise to a son in the events which happened, with this clause: "But he shall in no wise sell or alienate any of the property, as it is intended he shall have a life interest only in the same, with remainder over to his heirs in fee, * * and he shall in no wise come into possession * * until his twenty-second year." The son reached twenty-two, and it was held, on a case stated, that he had an estate tail, which he could convey, the conveyance to be under the Act of June 16, 1779, so as to bar the entail. No notice was taken of the prohibition against alienation. See also *Sprinkle v. Commonwealth*, 2 Walk. 420 (1884).

⁶ 213 Pa. 359 (1906).

Distinction Between Restraints and Precatory Trusts

190. It is often a difficult question of construction to determine whether the clause in question is a restraint or amounts to a trust. In *McIntyre v. McIntyre*,⁷ the testator directed as follows: "I will and bequeath to my daughter Mary, the one-half of the land that I possess above the road, that is, the north end. She will not have power to sell, but may leave the same to her children." The court held that Mary took a fee, and consequently those of her daughters who were devisees under her will, could succeed in an action of ejectment between themselves and other children of Mary who were not devisees under her will. The remarks as to the restraint on alienation, which the court said was void, were dicta, because the restriction was on selling and the disposition in question was by will. This case is close to the line and illustrates the difficulty.

Clause of Forfeiture Qualified as to Persons

191. The validity of a clause of forfeiture qualified as to persons is doubtful at common law. Mr. Gray⁸ suggests the rule in this form: that a condition is good if it allows of alienation to all the world, with the exception of selected individuals or classes, but is bad if it allows alienation to only selected individuals or classes. He further says⁹ that if conditions are not subject to the rule against perpetuities, it is desirable to make the rule more strict, as such provisions are generally in the form of conditions. No Pennsylvania case on the point has been found. The right of re-entry arising under a clause of forfeiture to the grantor is probably not subject to the rule against perpetuities in Pennsylvania.¹⁰ There is some advantage, therefore, in holding such a clause of forfeiture invalid. There is no occasion to make any distinction between a clause of forfeiture to the grantor and a clause of forfeiture to third persons. It is therefore in the interest of the simplicity of the law, and in line with the public policy of the community, to disallow such restraints altogether. It is to be hoped that the Supreme Court will reach this result.

⁷ 123 Pa. 329 (1889); see also *Turner v. Fowler*, 10 Watts, 325 (1840), stated §226, post.

⁸ *Restraints on Alien.*, 2 ed. (1895), §41.

⁹ *Restraints on Alien.*, 2 ed. (1895), §43.

¹⁰ See §367, post.

Preliminary Discussion of Clause of Prohibition Qualified as to Persons

192. The validity of a prohibition against voluntary alienation qualified as to persons, is in doubt. Mr. Gray makes no particular comment upon this case and it is probable¹ that he considers the prohibition void. The validity of the prohibition in Pennsylvania is sustained by the dicta referred to in the note.² The question has been discussed in a number of cases which will now be noticed.

Turner v. Fowler

193. In *Turner v. Fowler*³ the decision was against the validity of the restraint on the estate, which the court below said was a fee. On appeal, the Supreme Court affirmed, saying, however, that there was a life estate.

McCullough v. Gilmore

194. In *McCullough v. Gilmore*⁴ the testator directed that a certain farm should, after a preceding term which had come to an end, "fall into the possession of W., laying this injunction and prohibition, not to leave the same to any but the legitimate heirs of W.'s father's family at his (W.'s) decease." Held, that W. took a fee, and the restraint was void for uncertainty, and even if certain, was void as a restraint on a fee. W. was dead, leaving a will directing a different disposition, and in an action of ejectment by the heirs of the testator against tenant under W. judgment for defendant was affirmed.

Brothers v. McCurdy

195. In *Brothers v. McCurdy*⁵ the testator gave to his son James a certain lot of ground, and then provided, "It is further my will, that my said son James do not sell the above mentioned lot to any person, for the purpose of making brick, or carrying on the brickmaking business; more especially, it is

¹ Restraints on Alien., 2 ed. (1895), §§31, 105.

² Tilghman, C. J., in *M'Williams v. Nisly*, 2 S. & R., 507 at 513 (1816); Coulter, J., in *McCullough v. Gilmore*, quoting Tilghman, C. J., 11 Pa. 370 at

373 (1849); Woodward, C. J., in *Jaureche v. Proctor*, 48 Pa. 466 at 472 (1865).

³ 10 Watts, 325 (1840). See this case stated §227, post.

⁴ 11 Pa. 370 (1849).

⁵ 36 Pa. 407 (1860).

my will, that he should not sell said lot to Lotz & Beasley; my bequeath of said lot to be void, *in case of an offered sale*, contrary to my will, by my son James; and the said lot to be held in common among my other heirs, *should my son James offer to sell*, as aforesaid." The son sold the land to A., who used it for making brick. A. then sold to the defendants, and the heirs of the testator entitled under the devise over, brought ejectment. Judgment for the defendants was affirmed, the court saying that the clause in case of an offered sale was too indefinite for application, and that consequently, the devise over was void. The court further said that James took an indefeasible estate in fee simple, which was more than was necessary to the decision of the case. The effect of the clause prohibiting the sale to any person except for the purpose of making brick, etc., was not passed on by the court.⁶

Fisher v. Wister

197. In *Fisher v. Wister*⁷ there was a direction annexed to a gift in trust forbidding that the property should be sold out of the family. The case arose on a proceeding by one of the cestuis que trustent to have his part set aside to him, and the question turned on another clause in the will, providing for a devise over which was held void, and the question as to the prohibition of sale out of the family was not passed on by the court.⁸

Pennsylvania Law as to Prohibition Qualified as to Persons

198. The decision in all these cases can be explained on other grounds, and in none of them was the validity of the restraint affirmed. If the disallowance of such restraints is advisable on grounds of public policy, and it is submitted that it is, the Supreme Court can, under these authorities, when the question arises, decide that a restraint on the alienation of a fee simple estate qualified as to persons is void in Pennsylvania. There are several dicta, however,⁹ which sustain

⁶ This contingency was within the rule against perpetuities, as it was confined to the life of James.

⁷ 154 Pa. 65 (1893).

⁸ That such a clause is void, see Gray, *Restraints on Alien.*, 2 ed. (1895), §§35, 36. It is not clear in *Fisher v. Wister*

whether the restriction was on the equitable estate or on the legal title of the trustee. As to this point see language of the Master in the court below, p. 70.

⁹ §192, n. 2, ante.

the validity of such a prohibition, and the court may follow them and decide that the restraint is valid. No statement can be ventured as to the law.

Forfeiture for Voluntary Alienation Qualified as to Time

199. No Pennsylvania case of a clause of forfeiture upon the voluntary alienation of an absolute interest qualified as to time has been found. It appears from Mr. Gray's discussion¹⁰ that the law generally is in doubt, with the weight of authority against the validity of the clause. No statement can be ventured as to the law in Pennsylvania, but it is submitted that such a clause is void on grounds of public policy.

Preliminary Discussion of Prohibition of Voluntary Alienation Qualified as to Time

200. The validity of a prohibition against voluntary alienation of a fee qualified as to time is doubtful in Pennsylvania. The validity of the prohibition is sustained by several dicta;¹ but there are some cases which require comment. It may be first observed that a prohibition against alienation during minority is not superfluous, as was supposed in *Stone v. McMullen*,² because the alienation of a minor is voidable, not void. There seems to be no objection, on grounds of public policy, to the prohibition in this case.

Hauer v. Shitz

201. In *Hauer v. Shitz*³ there was a devise to F., with a proviso that the devisee should not sell until he arrived at the

¹⁰ *Restraints on Alien.*, 2 ed. (1895), §§45 to 54, inclusive.

¹ *Tilghman*, C. J., in *M'Williams v. Nisly*, 2 S. & R. 507 at 513 (1816); *Woodward*, C. J., in *Jaureche v. Proctor*, 48 Pa. 466 at 472 (1865), quoted with approval by *Green*, C. J., in *Kaufman v. Burgert*, 195 Pa. 274 at 276 (1900). In *Yost v. The Insurance Co.*, 179 Pa. 381 at 384 (1897), *McCollum*, J., said, by way of dictum, that a devise to A. forever, subject only to a restric-

tion of alienation until he attained the age of thirty years, was void; that in Pennsylvania the cases were conflicting, but seemed to sustain a partial restraint on alienation. In *Chadwick v. Stroud*, 27 Pa. C. C. 393 at 396 (1902), there is a dictum by *Sulzberger*, P. J., recognizing the validity of a prohibition on the devise of a fee not to sell or mortgage for ten years.

² 1 *Penny*, 108 at 113 (1881).

³ 3 *Yeates*, 205 (1801), s. c. 2 *Binn*.

age of thirty years, with a devise over if he died under twenty-one and without issue. The action was ejectment on the title of F., who had died over twenty-one and leaving issue. Held, that the title vested in the heir at law; consequently no question as to the validity of the restraint arose.

Kepple's Appeal

202. In *Kepple's Appeal*⁴ there was a devise to a son in trust "and for the use of his heirs at law * * * to have and to hold the same during his natural life * * * but he shall in no wise * * * sell or dispose of the same during his life." Held, that the son took a fee, and on a bill for the specific performance of an agreement to sell, it was held that the clause against alienation was void.⁵ This case clearly decides that a prohibition qualified as to time is void.

Hartman v. Herbine

203. In *Hartman v. Herbine*⁶ there was a devise to a son, William, which the court held, passed a fee, with this proviso: "He shall not be at liberty to sell or dispose of the same to any other person than to my son John or his heirs, as long as they are in possession of said farm; should my son John or his heirs dispose of the said farm, then my son William shall be at liberty thereafter to sell said four acres of land to other persons; should my son William die without lawful issue, and at the time of his decease be possessed of said land, then the proceeds thereof shall be divided among my other children, or their legal representatives in equal shares." The court held that the restrictions were void, and that William took a marketable title.⁷

532 (1807); in the report in 3 Yeates, Shippen, C. J., at p. 220, said that the restraint was void. See also pp. 233 and 245. Tilghman, C. J., in the report in 2 Binn. at p. 546, said that the validity of the restraint seemed to be immaterial.

⁴ 53 Pa. 211 (1866).

⁵ Strong, J., at p. 212, said: "The attempted restraint upon alienation is inoperative, it being beyond the power

of a deviser, after having created a fee simple, to make it inalienable."

⁶ 7 Pa. C. C. 630 (1890).

⁷ The court said that they were void because (1) a restraint on a fee; (2) the restraint was indefinite in time, to last during the life of John and his heirs; (3) of uncertainty as William or his heirs would become John's heirs on John's death without issue.

Pennsylvania Law as to Validity of Prohibition of Voluntary Alienation Qualified as to Time

204. The validity, therefore, in Pennsylvania of a prohibition against the voluntary alienation of an absolute interest qualified as to time rests on a few dicta only,⁸ and is opposed by the dictum of Shippen, C. J.⁹ It was decided in *Kepple's Appeal*,¹ that a restraint limited to the life of the first taker, was void. It is to be observed, although this point was not mentioned in the case, that such a prohibition is invalid, as it amounts to a restraint upon alienation by deed,² which is admittedly void as amounting to a general restraint.³ A restraint for an indefinite time was held void in *Hartman v. Herbine*.⁴ The dicta, therefore, in favor of the validity of the prohibition, must be considered as limited by a period less than a life, and the dictum of Tilghman, C. J.,⁵ that the restraint might last during the life of any person in existence at the time of making the deed, must be considered as overruled.⁶ It is submitted that the restraint is against public policy and should be disallowed; that in this condition of the authorities, the Supreme Court can reach the conclusion that the prohibition against the voluntary alienation of a fee simple estate qualified as to time, is void, and that in no event under the cases can they reach the conclusion that the qualification is valid for even so long as the life of the first taker.

Clause of Forfeiture for Alienation Qualified as to Manner

205. A clause of forfeiture aimed at any particular method of alienation, is as bad as if directed against alienation generally,⁷ as a gift over, upon mortgaging or conveying. So also, a gift over if the grantee does not convey in his lifetime, is void and is invalid as amounting to a restraint on alienation by will.⁸ In like manner, a gift over if the donee does not

⁸ See §200, n. 2, ante.

⁹ See §201, n. 4, ante.

¹ 53 Pa. 211 (1866), stated §202, ante.

² *Jaureche v. Proctor*, 48 Pa. 466 (1865), stated §207, post; *Kaufman v. Burgert*, 195 Pa. 274 (1900), stated §209, post.

³ *Gray, Restraints on Alien.*, 2 ed. (1895), §55, et seq.

⁴ 7 Pa. C. C. 631 (1890), stated §203, ante.

⁵ In *M'Williams v. Nisly*, 2 S. & R. 507 at 513 (1816).

⁶ There is no room for any distinction between the life of the first taker of the estate, and the life of a third person; *Gray, Restraints on Alien.*, 2 ed. (1895), §50.

⁷ *Gray, Restraints on Alien.*, 2 ed. (1895), §55.

⁸ *Gray, Restraints on Alien.*, 2 ed. (1895), §§56, 56b.

dispose by will, is void as amounting to a restraint on alienation by deed. No Pennsylvania case on the point has been found, and the common law should prevail unless there is some good reason to the contrary.

Law in Pennsylvania as to Validity of Prohibition of Alienation Qualified as to Manner

206. A prohibition against alienation qualified as to manner is void, on the same principle that a clause of forfeiture against alienation qualified as to manner is invalid.⁹ The law on this point is clear in Pennsylvania, and is supported by the two cases next discussed.

Jaureche v. Proctor

207. In *Jaureche v. Proctor*,¹⁰ after an absolute gift by will to testator's wife, there was the following clause: she was "not to divest herself of what I may leave her until after her death," and further, that at her death "what I may have left her, that is to say, the residue, is to be divided in equal shares among our children." Held, in a case stated on an agreement by the wife to convey, that she had a fee simple estate; that the direction that she should not divest herself was void as a restraint on alienation, and that the use of the word "surplus" implied that she was to have the right to consume the whole. The court, Woodward, J., pointed out that the restraint was, in effect, a restraint on alienation by deed and the case is therefore inserted here. The learned judge evidently understood alienation as meaning transfer by deed only.¹

Kaufman v. Burgert

209. In *Kaufman v. Burgert*² there was a gift to A. with a clause that he should not "sell and dispose of any part thereof, that the same shall go and vest in his heirs, unless he shall devise the same by his last will and testament, which

⁹ See §205, ante.

¹⁰ 48 Pa. 466 (1865).

¹ Penrose, J., in *Barker's Estate*, 159 Pa. 518 at 526 (1894), understands this case as deciding that a restraint on the alienation of a vested interest prior to

its coming into possession is valid. It is difficult to see how the case can be said to decide such a proposition. See §185, ante, for a discussion of this point.

² 195 Pa. 274 (1900).

he is authorized and empowered hereby to do." It was held, on a case stated, that A. had a good marketable title.

Discussion of Principles Involved in a Clause of Forfeiture for Failure to Alienate

212. A clause of forfeiture for failure to alienate a fee simple presents a case of some difficulty. It cannot be known whether the donee has failed to alienate until he is dead. The clause of forfeiture must therefore be operative at his death, if it is operative at all. The limitation consequently takes the form of a gift over on death without a will, or without having made a deed, or both. The clause does not restrain alienation in any way. The only effect it has is to alter the course of transmission of the property after the death of the first taker, and this is a very common effect of an executory devise. The circumstance that the estate must take a different course is of no moment from the point of view of public policy. It is difficult therefore to see why, on grounds of public policy, there can be any objection to the limitation. Several reasons have been advanced for the invalidity of the limitation.⁴ The first reason assigned is that the limitation over is void because repugnant to the estate in fee in the first taker. This is the ground relied on in *Karker's Appeal*.⁵ A gift over on the doing of an act pertaining to a fee, as, for instance, alienation, is void, not because it is repugnant to the estate granted, but because it restrains the doing of the act, and is, therefore, such a restraint as is within the purview of the principles of public policy already discussed.⁶ If the owner has power to alienate, the law does not concern itself with the circumstance that he voluntarily abstains from alienation; that is his affair. Since, therefore, the event is of no consequence from the standpoint of public policy, it is difficult to understand why the law should invalidate the limitation over on the happening of the event. The second reason advanced for the invalidity of the limitation is that the passage of the fee simple to the heirs at law on the death of the donee intestate is a necessary incident of an estate in

³ Gray, *Restraints on Alien.*, 2 ed. (1895), §57. matter is discussed more in detail.

⁵ 60 Pa. 141 (1869).

⁴ See Gray, *Restraints on Alien.*, 2 ed. (1895), §§57 to 74g, where the whole

⁶ §§11 and 12, ante.

fee and cannot be taken away. This is practically the same reason as the first but does not apply to a limitation on failure to alienate by deed, because there the limitation over may take effect even if the donee dies leaving a will.⁷ The third reason assigned is that the limitation over is void because it can be defeated by an act of the first taker. This proposition, as Mr. Gray observes,⁸ is a singular fallacy, and involves a misapplication of the well-settled principle that an executory devise cannot be defeated by a destruction of the preceding estate. No act of the first taker concerning the estate on which the executory devise is limited, can prevent the devise from taking effect. This does not mean, however, that the executory devise is bad, because the happening of the contingent event itself is in the control of the first taker. It may, therefore, be concluded that a clause of forfeiture for failure to alienate a fee simple estate is valid on principle, and that the reasoning commonly assigned to support the invalidity of the clause will not bear examination.

Law in Pennsylvania as to Clause of Forfeiture for Failure to Alienate

213. In Karker's Appeal⁹ there was a devise to A. in fee, but if he should die intestate and without issue, then to B. and his heirs, and the court held that the gift over to B. was void, and that A. took an absolute estate in fee simple. The same principle has been applied to a like limitation in equity,¹⁰ and to a similar gift of the residue composed of real

⁷ See Gray, *Restraints on Alien.*, 2 ed. (1895), §58.

⁸ Gray, *Restraints on Alien.*, 2 ed. (1895), §69.

⁹ 60 Pa. 141 (1869); understood by the learned Master in *Fisher v. Wister*, 154 Pa. 65 at 80 (1893), since the word "intestacy" was used, which impliedly gave power of conferring by will, as ignoring the distinction pointed out by Mr. Budd in Vol. 2 *Leading Cases on Real Property*, p. 476, that the power of disposition, to have the effect of destroying such an executory devise over, must be general, that is, must not be limited to any particular method of conveyance. In *Boyd v. Bigham*, 4 Pa.

102 (1848), there was a limitation over on death, without making a will, which was not discussed, the case being decided on other grounds; see dictum Sergeant, J., in *Zimmerman v. Anders*, 6 W. & S. 218 at 220 (1843).

¹⁰ *Fisher v. Wister*, 154 Pa. 65 (1893). The learned Master, whose opinion was affirmed on appeal, notices some of the objections to this doctrine stated in the text, but evidently, see p. 77, felt himself bound by Karker's App., 60 Pa. 141 (1869). See article by Edward Brooks, Jr., in 32 *Am. Law Reg.*, N. S. at 1045 (1893), where the learned author understands *Fisher v. Wister* as departing from the general rule.

and personal property.¹ In all of these cases, the clause of forfeiture was void, because it amounted to a restraint on alienation qualified as to manner.² The way, therefore, is open to the Supreme Court to repudiate the artificial reasoning relied on in these decisions, and reach a conclusion that the clause of forfeiture for failure to alienate a fee is valid.

Restraints on Absolute Interests in Personal Property

214. The rule is the same as to absolute interests in personal property as it is with respect to devises in fee of real estate. Any attempted restraint on alienation is void, and there is no distinction between chattels real and chattels personal.³ No Pennsylvania cases on this point have been found, but there is no reason why the law should be different. It is for this reason that a lessee who transfers his entire interest can impose no condition upon the transferee.⁴

Gifts Over of Unconsumed Property

215. A gift over of the unconsumed part of personal property was originally held to be void, owing to the difficulty of separating it from the other effects of the donee, and of ascertaining the part of the fund which was unconsumed.⁵ In Pennsylvania, however, a gift over at law of the unconsumed part of personal property is valid.⁶

¹ Gillmer v. Daix, 141 Pa. 505 (1891); the grounds of decision are not clear.

² See §§205, 206, ante; Gray, Restraints on Alien., 2 ed. (1895), §56b.

³ Gray, Restraints on Alien., 2 ed. (1895), §27.

⁴ Gray, Restraints on Alien., 2 ed. (1895), §102.

⁵ Gray, Restraints on Alien., 2 ed. (1895), §58. That objection, however, does not apply in modern times in cases where the property is left in trust, as the trustee can furnish the means of identifying the unconsumed principal.

⁶ Dickinson's Est., 209 Pa. 59 (1904); Tyson's Est., 24 Super. Ct. 533 (1904).

CHAPTER 10

ABSOLUTE LEGAL INTERESTS. INVOLUNTARY ALIENATION

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Forfeiture for Involuntary Alienation

217. No Pennsylvania case has been found of a clause of forfeiture upon the involuntary alienation of an absolute legal interest. There seems to be no reason why such a proviso should not be valid. A man may be made to lose his estate upon almost any conceivable contingency, so long only as the contingency is lawful and happens within the period prescribed by the rule against perpetuities.¹ There is nothing unlawful about involuntary alienation; indeed, it is alienation prescribed by law. A similar limitation on voluntary alienation is admittedly void.² Voluntary alienation is a lawful act. Why should there be any difference? The distinction is this: a clause of forfeiture on voluntary alienation prevents the owner from disposing of the property, as it precludes him from ever getting any value for it. It therefore ties up the property, and is within the principles of public policy already discussed.³ A clause of forfeiture upon involuntary alienation

¹ See Part III on the rule against perpetuities.

² See §187, ante.

³ See §§11 and 12, ante.

only prevents the creditor from getting the property, and the law takes no account of this contingency so long as the debtor cannot keep it as against the creditor. The fact that a debtor loses his estate just as the creditors are about to take it, may be a hardship on them, but is no greater or different hardship than that suffered by the creditors of the life tenant when the estate expires, or by the creditors of a debtor who holds an estate subject to an executory devise which takes effect and deprives them of the chance to satisfy their claims.⁴ It may be concluded, therefore, although there is no authority for the proposition, that a clause of forfeiture upon involuntary alienation of an absolute legal interest is valid, provided it does not violate the rule against perpetuities.

Preliminary Discussion of Prohibition of Involuntary Alienation

218. A clause prohibiting the involuntary alienation of an absolute legal interest, is void at common law,⁵ and there are some dicta in Pennsylvania to the same effect.⁶ The law in Pennsylvania, however, may be otherwise.⁷ The cases will now be discussed.

Curtis v. Longstreth

219. In *Curtis v. Longstreth*⁸ the devise was to A. for "his natural life, not to be sold or exchanged while he lives, and at his death to vest in his heirs as tenants in common." A.'s title was sold by the sheriff, and the court said that the purchaser took a good title. A. had an estate tail, which was turned into an estate in fee by the sheriff's sale, under the provisions of the Act of April 15, 1859.⁹ This case is not strictly in point, being a case of a prohibition on an estate

⁴ Mr. Gray appears to draw no distinction between voluntary and involuntary alienation with respect to an absolute interest.

⁵ Gray, *Restraints on Alien.*, 2 ed. (1895), §§113-115.

⁶ *Sprinkle v. Commonwealth*, 2 Walk. 420 (1884). *Kaufman v. Burgert*, 195 Pa. 274 (1900), *semble*. *Sharswood, J.*, in *Ingersoll's App.*, 86 Pa. 240 at 245 (1878), speaking of the power of dispo-

sition of the testator, said: "There are many things he cannot do, however clearly he may intend it. He cannot create a fee and clog the power of alienation, or relieve it from liability for debts."

⁷ For a discussion of the arguments for and against the validity of the clause, see §§252-254, *post*.

⁸ 44 Pa. 297 (1863).

⁹ P. L. 670.

tail. The learned reader, however, will observe from an examination of the case, that it was evidently not considered worth while at that time to argue that the prohibition was valid when attached to an estate tail. A fortiori it would be void when attached to a fee.

Keyser's Appeal

220. In *Keyser's Appeal*¹⁰ a cestui que trust of an absolute equitable interest was permitted to terminate the trust, notwithstanding a clause against involuntary alienation. The question as to the validity of the clause would not be before the court until there was an attempt by creditors to reach the legal interest. The court said, however, that since the clause was invalid as to a legal fee, the trust was not active and the statute of uses applied.¹¹ The remarks of the court, therefore, as to the validity of the clause, were probably dicta.

Willard v. Davis

221. In *Willard v. Davis*¹ there was an absolute gift to a son, without liability for any indebtedness of his, with a further proviso that the executors should hold it in trust, and that they might, in their discretion, after five years give the son full and complete control of his estate. The question as to discretion was not discussed or passed upon. The court held, on a case stated, that the son had a marketable title to his share in the property devised, on the ground that the words "giving the executors control" were void as inconsistent with an absolute grant. Ewing, P. J., in the court below, said, "the attempt is, after granting a fee simple absolute * * * to appoint a guardian to take charge of the property for the life of the devisee, and to declare the property free from liability for the debts of the owner. This cannot be done. It is inconsistent with the grant, and especially it cannot be done without the use of apt words, which are wanting in the will." The decision is sound, but the language of the court is unfortunate as countenancing the view that such a restraint can be imposed by appropriate words.

¹⁰ 57 Pa. 236 (1868), stated §246, post. this point.

¹¹ See §131, ante, for a discussion of ¹ 3 Penny. 86 (1882).

Beck's Estate

222. In Beck's Estate² the testatrix gave her step-daughter, Elizabeth, certain chattels and a share in the residue of her estate, and after declaring that this share was in consideration of work done and attendance during her late illness, provided as follows: "And whereas, said Elizabeth Beck was unfortunate in business transactions, whereby she became indebted, part of which still remains unpaid, and having no means to pay the same, now it is my will, that the above equal share in my estate, as well as the specific bequest given to her, are given to her expressly upon condition that they shall not be liable to be attached or seised for the debts or moneys which said Elizabeth Beck may owe at the time of my decease, but that the whole amount of her share shall be paid directly to said Elizabeth Beck by my executor without diminution for the payment of her said indebtedness." The funds due Elizabeth in the hands of the executors, apparently the share of the residue, were attached by a judgment creditor. The court awarded payment to Elizabeth instead of to the attaching creditor. It was found as a fact by the auditor in the court below, that the share due Elizabeth was wages, and therefore, not the subject of attachment. As the attachment seems to have covered only this share, and not the specific chattels, the case seems to be properly decided on that ground, without reference to the clause against alienation.³

² 183 Pa. 51 (1890).

³ It was suggested by the learned auditor, at p. 53, and by Mr. Gray, *Restraints on Alien.*, 2 ed. (1895), §124g, that the executor was a trustee; by the auditor, on the ground that the will directed the executor to pay the money directly to Elizabeth, thereby constituting, as to that, a special trust which is the ground on which Chief Justice Paxson went in the Supreme Court; by Mr. Gray on the ground that the legatee did not have the legal title until the payment of the legacy or the assent of the executor, and therefore, the executor was a trustee for Elizabeth. It is difficult, however, to see why there was not as much assent here by the executor as there ever is in prac-

tice. The only thing which stood between Elizabeth and the payment of her legacy was the attachment. The executor having filed his account, had no further voice in the matter. Under the law as it formerly stood, when the legatee had a remedy in the Common Pleas no assent by the executor was necessary; *Holloback v. Van Buskirk*, 4 Dallas, 147 (1795). The remedy of the legatee is now exclusively in the Orphans' Court: *Ashford v. Ewing*, 25 Pa. 213 (1855), and the question as to necessity of assent by the executor seems to have become obsolete. If there was a trust, who was the cestui que trust, and why did not the legal and equitable titles merge?

Goe's Estate

223. In Goe's Estate⁴ the testatrix, after a direct gift to her children in equal shares, provided: "It is my distinct will and desire that none of the effects, real, personal or mixed, as above devised and bequeathed to my children or to either of them, can be seised upon or levied upon for any debt * * * against any one of my said children." The share due one of the legatees was attached in the hands of the executor, by an attachment served December 13, 1889. The legatee had previously assigned his interest by an assignment dated August 17, 1889, and the contest was between the creditor and the assignee. The court below awarded the fund to the assignee, which, on appeal, the Supreme Court affirmed. The remarks of the court as to the prohibition of involuntary alienation were dicta, as the legatee had previously assigned his interest, which assignment would operate to defeat the clause against involuntary alienation, even if it were valid.⁵ The report does not state whether the assignee gave notice before the attachment was served or not. If he did, the decision is clear. If not, since the wording of the restraint provided only against involuntary alienation, and the fund was awarded to a voluntary assignee, the decision would also be correct on that ground.

Summary of Law in Pennsylvania as to Validity of Prohibition of Involuntary Alienation of an Absolute Legal Interest

224. No other cases have been found, and as the dictum in Keyser's Appeal⁶ and the dicta cited⁷ are express authorities against the validity of the clause, and Goe's Estate⁸ and Beck's Estate⁹ can both be explained, it may be said that it is the law in Pennsylvania that a clause prohibiting the

⁴ 146 Pa. 431 (1892). Mr. Gray, *Restraints on Alien.*, 2 ed. (1895), §124g, reconciles Beck's Est., Goe's Est., and Keyser's App. by understanding Keyser's App. to relate to a legal interest, and that Beck's and Goe's Ests. are uncontradicted authorities that an equitable fee can be subjected to the clause against alienation. It is believed, however, that Beck's Est. and Goe's Est. are to be explained as above stated,

and that Keyser's App. is merely an authority for the proposition that the prohibition against involuntary alienation does not prevent the operation of the statute of uses, as to which, see §131, ante.

⁵ See §173, ante.

⁶ 57 Pa. 236 (1868), stated §220, ante.

⁷ §218, n. 6, ante.

⁸ 146 Pa. 431 (1892), stated §223, ante.

⁹ 133 Pa. 51 (1890), stated §222, ante.

involuntary alienation of a legal estate in fee in real estate or legal absolute interest in personal property is void, notwithstanding the unfortunate remarks in *Willard v. Davis*.¹⁰ At any rate, the way is open to the Supreme Court to reach such a conclusion on the authorities, and that such a result is eminently desirable is submitted in another part of the discussion.¹ The Supreme Court may, however, refuse to disregard the dicta in *Goe's Estate* and *Beck's Estate*, and say that those cases sustain the principle that the testator may exempt a legacy in the hands of his executors from an attachment. While such a conclusion is possible, if it is reached, it should be limited expressly to the case of an attachment against a legacy. It is submitted, however, that it is certainly possible and desirable to disregard these dicta.

¹⁰ 3 Penny. 86 (1882), stated §221, ante. arguments for and against the validity

¹ See §§252-254, post, discussing the of the clause.

CHAPTER 11

LEGAL ESTATES FOR LIFE

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Clause of Forfeiture for Voluntary Alienation

225. A clause of forfeiture for the voluntary alienation of a life estate is valid at common law.¹ No Pennsylvania case on this point has been found, and there seems to be no reason why the law should be different. A like restraint is void when attached to a fee, as opposed to public policy.² In the case of a life estate the considerations are different. The clause is valid because the forfeiture of the life estate accelerates the next estate in remainder, and thus hastens the return of the fee to its former undivided condition.³

¹ Gray, *Restraints on Alien.*, 2 ed. (1895), §§78, 90.

² See §187, ante.

³ See §333, post.

Preliminary Discussion as to Prohibition of Voluntary Alienation

226. Where there is a provision that the life tenant shall not assign or alienate the estate, that is, a direction that he cannot rid himself of it, the provision is void at common law.⁴ The law in Pennsylvania is in doubt.⁵ The only case which has been found will now be discussed.

Turner v. Fowler

227. In *Turner v. Fowler*⁶ a testator devised to his daughter A., a certain part of a tract of land, and gave the remainder to be equally divided between his daughter B. and son C., and then provided as follows: "And further my will is that neither A., B. nor C. is not to sell their right in or to said land to any but he or she who is in possession of the remainder, and at the decease of the last of said three, if B. has no heirs, said land is to descend to the male heirs of my other sons." C. sold to the plaintiff, who claimed an ejectment against the widow of the son B. who was in possession. C. being still alive, judgment for the plaintiff was affirmed on appeal. Sergeant, J., said that A., B. and C. each took life estates with cross-remainders to the survivors for life, and that there was an executory devise over at the death of the three; that the plaintiff could recover on C.'s life estate; that B. had, by purchasing another title in his lifetime, put himself in a position of claiming in another right not under the will, for which reason C. was exempt from performing the condition so far as B. was concerned, and the judgment of the lower court, which was that the plaintiff had a fee, was affirmed.⁷

Pennsylvania Law as to Validity of Prohibition of Voluntary Alienation

228. This is the only Pennsylvania case presenting the question as to a legal life interest which has been found, and as

⁴ Gray, *Restraints on Alien.*, 2 ed. (1895), §134.

⁵ Gray, *Restraints on Alien.*, 2 ed. (1895), §134, says that such provision is void in Pennsylvania, citing *Hahn v. Hutchinson*, 159 Pa. 133 (1893), see §232, ante; *Erisman v. Sener*, 162 Pa. 577

(1894); see §231, post. Neither case is in point, as they both arose upon a clause against involuntary alienation.

⁶ 10 Watts, 325 (1840).

⁷ Sergeant, J., in the Supreme Court said, that if C. could recover, the plaintiff could; that if the words amounted to

it can be explained on other grounds, the case can hardly be said to be an authority for the proposition that such a prohibition is valid. As the common law is the other way, and there is no reason why the law should be different in Pennsylvania, the statement may be ventured that a prohibition of the voluntary alienation of a legal life interest is void in Pennsylvania.

Forfeiture for Involuntary Alienation

229. A clause of forfeiture upon the involuntary alienation of a legal life estate or interest, is valid at common law.⁸ No Pennsylvania case on the point has been found, and in the absence of any authority to the contrary, the common law may be said to prevail.

Preliminary Discussion of Prohibition of Involuntary Alienation

230. A prohibition against the involuntary alienation of a life estate or interest is void at common law.⁹ If the proviso has the effect of making the life tenant lose his estate upon involuntary alienation, it is valid. If it is an attempt to exempt the life estate from involuntary alienation, it is void. The law in Pennsylvania as to the validity of a prohibition of involuntary alienation of a legal life interest is not altogether clear. The cases are as follows:

Erisman v. Sener

231. In *Erisman v. Sener*¹⁰ a woman devised all of her estate to her husband for life, and directed the same to be sold after his death, and divided among her children, and used the following language: "And in no event shall my property be sold until my son Edward B. shall have attained the age of twenty-one years. And no encumbrances or liens to be placed on the same during the lifetime of my said

a trust, the defendant could only defeat the plaintiff's right by tendering to him the purchase money; that as a condition, the words were ineffective, as there was no limitation over upon the condition broken, and no reservation of a right of entry to the deviser or his

heirs for condition broken.

⁸ Gray, *Restraints on Alien.*, 2 ed. (1895), §§78, 80.

⁹ Gray, *Restraints on Alien.*, 2 ed. (1895), §134.

¹⁰ 162 Pa. 577 (1894).

husband, nor to be liable in any way for any debts he may have contracted or may contract." The life estate of the husband in certain of the premises was sold under execution on a judgment against him, and the purchaser at the sheriff's sale brought ejectment against the husband and recovered, the clause against involuntary alienation being held invalid.

Hahn v. Hutchinson

232. In *Hahn v. Hutchinson*,¹ the testatrix devised her estate to her husband on such terms that under the construction adopted by the court the husband was trustee and cestui que trust for life of the entire estate, with a claim prohibiting involuntary alienation, as follows: "Not to be subject to his individual debts * * * or any process issued for the collection of the same * * * but the same is to be paid into his own hand and cannot be anticipated, sold or pledged." The subject matter was real estate, and as the equitable life estate and legal title were in the same person, there was a merger, and the case presented was that of a clause against involuntary alienation imposed on a legal life estate. The proceeding was by rule by the creditor for writ to sequester the income of the life estate. It appears that the rents of the real estate were to be sequestered in the hands of the husband as trustee, although the case is not clear on that point. The rule was made absolute, which, on appeal, was affirmed.²

¹ 159 Pa. 133 (1893).

² Mr. Justice Green, in delivering the opinion of the court, considered the cases which decide that an absolute owner of property cannot convey it in trust, reserving a benefit for himself so as to relieve the property from the claim of his creditors, and then made use of the following language: "The whole course of the reasoning is that a man shall not be the real owner of property with the full right to deal with it as he pleases, taking the full income of it to his own exclusive use, and keep the same free from the claims of his creditors. What he cannot do for himself in this regard cannot be done for him by another. When the grant comes from another

and yet has these incidents, it is as obnoxious to the foregoing objections as when it arises upon his own grant to third persons as trustees for him." The language of the court is not quite clear. It is believed, however, that what the learned judge meant by absolute ownership was a union of the legal and equitable title, and that what the decision more accurately expressed was that there was a merger of a legal title and equitable ownership; and that the title being in the life tenant, the clause against alienation was invalid. If this is so, the decision is perfectly plain, and in accordance with *Erisman v. Sener*, 162 Pa. 577 (1894), stated §231, ante.

Wanner v. Snyder

233. In *Wanner v. Snyder*³ where there was a devise by a wife of the entire legal estate to her husband for life, subject, however, to a charge for the education of a young girl, and an annuity of \$150 a year to be paid to her until she married, the court held that as the husband was under the liability of paying the charges, the income was not subject to the claims of his creditors. There was no clause against alienation in this case, and it is difficult to see how the court came to the conclusion reached. Mr. Justice Green, in delivering the opinion of the court, said: "In order to perform those duties, he must receive and control the entire income of the estate, and he must do it in the manner directed by the will. It follows, hence, that he has no absolute estate or ownership of the income in the sense which makes it liable for his debts, and the case, therefore, is not within the line of decisions above cited. On the contrary, we think the case is within the reasoning in *Holdship v. Patterson*, 7 W. 547; *Ashhurst v. Given*, 4 W. & S. 323, and *Brown v. Williamson*, 36 Pa. 338, and the first two of which go much further in the line of protection for such interests against the claims of creditors than it is necessary to go in this instance." The three cases cited, however, are none of them in point, for they all contain the clause against alienation, which was absent in this case. The case, furthermore, is in direct conflict with *Pierce v. McKeehan*,⁴ which, however, does not appear to have been called to the attention of the court, and there is no reason why the court should not have arrived at the same conclusion in *Wanner v. Snyder*. It is true that there might not be any balance of income due the life tenant after satisfying the charges. It does not, however, follow that there was no such balance, and whatever balance there was should be subject to the claims of his creditors.

Distinction Between Wanner v. Snyder and Hahn v. Hutchinson

234. In *Wanner v. Snyder*⁵ the court followed the reason-

³ 177 Pa. 208 (1896).

⁴ 3 Pa. 136 (1846). In that case, the testatrix bequeathed the residue of her estate to her son B., subject to the maintenance of her son Joseph. B. made an assignment for the benefit of

creditors, and the court held that the assignee was entitled to the funds of the estate, subject, however, to the duty of executing the trust in favor of the son Joseph.

⁵ 177 Pa. 208 (1896), stated §233, ante.

ing adopted in *Hahn v. Hutchinson*⁶ that there could be no valid spendthrift trust where the trustee is also the cestui que trust, with the absolute ownership of the subject of the trust, whether income or principal. Mr. Justice Green, in *Wanner v. Snyder*, however, fails to point out the most important distinction between the two cases—*Hahn v. Hutchinson* and *Wanner v. Snyder*—which is, that in the former case, there was a clause against involuntary alienation, and in the latter case, none. How to arrive at the decision in *Wanner v. Snyder*, from the case of *Hahn v. Hutchinson*, is a question not easily answered. To say that the clause is invalid in so far as the legal title is concerned, is one thing; to say that such a clause is invalid as to the legal title, and that, therefore, a legal title, subject to a charge which may or may not consume the entire estate is, without any clause at all, free from involuntary alienation, is a piece of reasoning which it is difficult to follow.

Statement of Pennsylvania Law as to Validity of Prohibition of Involuntary Alienation

235. As the clause prohibiting the involuntary alienation of a legal life interest is void at common law, the same principle should obtain in Pennsylvania, unless there is some good reason to the contrary. *Erisman v. Sener*⁷ and *Hahn v. Hutchinson*,⁸ although the language of the court is not clear in either case, squarely decide in favor of the common law principle. *Wanner v. Snyder*⁹ seems to be authority for a different result. Since, however, the case is inconsistent with the earlier case of *Pierce v. McKeehan*,¹⁰ and is open to objection on principle, it is perhaps not too much to hope that it will be overruled. It may therefore be said that it is the law in Pennsylvania that the clause prohibiting involuntary alienation of a legal life estate is void, which statement of the law is rendered doubtful only by the case of *Wanner v. Snyder*.¹ The reasons for and against the validity of the prohibition are discussed at another point.²

⁶ 159 Pa. 133 (1893), stated §232, ante.

⁷ 162 Pa. 577 (1894), stated §231, ante.

⁸ 159 Pa. 133 (1893), stated §232, ante.

⁹ 177 Pa. 208 (1896), stated §233, ante.

¹⁰ 3 Pa. 136 (1846).

¹ 177 Pa. 208 (1896), stated §233, ante.

² See §§252-254, post.

CHAPTER 12

ABSOLUTE EQUITABLE INTERESTS

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Forfeiture for Voluntary Alienation

237. A clause of forfeiture upon the voluntary alienation of a legal absolute interest is generally void.¹ There is no

¹ See Chap. 9, ante.

reason why the law should be different in equity. No Pennsylvania case of such a clause of forfeiture upon an absolute equitable estate has been found. In the absence, however, of any authority to the contrary, the principle in equity may be said to be the same as that which obtains at law.

*Preliminary Discussion as to Prohibition of the Voluntary
Alienation of an Equitable Fee*

238. In like manner, the law relating to a clause of prohibition on the voluntary alienation of an equitable absolute interest should be the same as that which prevails at law.² There are, however, several recent cases in which the question has come before the court, and which require examination before any conclusion can be drawn as to the law. These cases will now be discussed.

Barker's Estate

239. In *Barker's Estate*³ a testatrix appointed her husband her executor with power to take charge of her estate, real and personal, and dispose of it in his discretion, subject to the restrictions and conditions of her will, paying incumbrances and dividing the balance among the children; such distribution not to take place till the husband's death; until then, the income, or so much thereof as he might desire, to be applied to the support of himself and of such members of his family as might, in his discretion, require it. On any child becoming of age, the husband was authorized, if he deemed it expedient, to bestow on such child the portion of the estate which it would inherit on the husband's death. The testatrix also declared that if, in such bestowal, the husband should exceed the share which would otherwise have fallen to any child, he should not be liable to account to the other children. And she added, "It is my will in creating the foregoing trust for the maintenance and support of my husband and family that the same shall be enjoyed by him and them without being in any way subject to or liable for the debts or engagements of my said husband or any of our children." A son of the testatrix who had reached twenty-one, made an assignment for the benefit of his creditors, and the husband after-

² See Chap. 9, ante.

³ 150 Pa. 518 (1894).

ward advanced to this son a portion of his share.⁴ The husband filed his account as executor, and the assignee of the son claimed the amount which had been paid to the son after the assignment. The Orphans' Court disallowed the claim of the assignee of the son. This case is very badly reported, and it is not surprising that Mr. Gray⁵ failed to understand why the two women, Anna B. Scott and Deborah Mellor, appealed. It appears from an examination of the record that the assignee of the son did not appeal. The two women who appealed objected to certain items in the account relating to investments. The question, then, as to the propriety of the advancement to the son was not before the Supreme Court. The case, therefore, is deprived of much of its force on this point, as it is only a decision of the Orphans' Court. The criticism by Mr. Gray on the case is given in full in the note, and leaves little to be added.⁶ The auditing judge, Ashman,

⁴The above statement is, with a slight alteration, taken from Gray, *Restraints on Alienation*, 2 ed. (1895), §124h.

⁵*Restraints on Alien.*, 2 ed. (1895), §124h.

⁶*Restraints on Alien.*, 2 ed. (1895), §124i, et seq. "In the Orphans' Court the auditing judge ruled that the children took vested interests when they reached twenty-one, but that the husband 'had the right to bestow upon any of the children a sum greater or less than their respective shares. If he chose to exercise that option by giving to the children, other than the bankrupt, a sum so far in excess of their portions as should leave nothing to the debtor, the creditors would be powerless.' The Orphans' Court affirmed the decision of the auditing judge. They said: 'Where there is a present gift, in possession, of the entire beneficial ownership, a trust to protect against creditors is invalid: *Keyser's Appeal*, 57 Pa. 236; but the power of alienation may, unquestionably, be withheld in the case of a contingent interest before it vests, even in England: *Large's Case*, 2 Leon. 82; 3 Leon. 182; *Barnett v. Blake*, 2

Dr. & Sm. 177; and so it would seem in Pennsylvania in case of a vested interest, prior to its coming into possession, or where the restraint is confined to a limited period not transgressing the rule against perpetuities: *McWilliams v. Nisly*, 2 S. & R. 507, 513. See also *Jaureche v. Proctor*, 48 Pa. 472.' The Court refers also to *Beck's Estate* and *Goe's Estate*, ubi supra. The Supreme Court affirmed the decision, saying that they did so on the reasons given in the opinion of the auditing judge. It does not seem entirely clear that the son did not have a legal interest, but assuming that he had only an equitable interest the ruling of the auditing judge appears to amount to this. If A. having an equitable vested interest in remainder in a trust fund after a life interest given to the trustee, assigns that interest, and the trustee waives his life estate and is ready to pay over A.'s interest at once, the trustee can ignore the assignment and pay the money directly to A., provided he has power to appoint the fund away from A. This is the reasoning approved by the Supreme Court, but it seems open to some criticism. Sup-

J.,⁷ placed the decision on the ground that as the trustee had discretion to give the principal among the children in such shares as he saw fit, he might distribute it to the others to the exclusion of the son; that, therefore, the son would have no standing to compel the exercise of the discretion in his favor. As he, therefore, had nothing to assign, his assignee would take nothing. In no event could the trustee be surcharged for payment after the assignment unless he had notice thereof, and as it does not appear that he had such notice, the case would appear to be well decided on this ground alone.⁸ Unfortunately the court in banc, in dismissing the exceptions, placed the decision on other grounds. Penrose, J., delivered the opinion of the court, and said⁹ that the clause against involuntary alienation applied to the share of the son in the principal, and prevented voluntary alienation for payment of debts.¹⁰ The learned judge seemed to proceed on the theory that a restraint

pose the trustee had died, and his successor is dividing the property, and has notice that A. has assigned his share, he would surely have to pay it to the assignee, and what difference can it make that the life tenant waives his interest, and allows the vested interest in remainder to come into possession at once? And again, what difference can it make that the vested interest could have been divested by the exercise of a power if the power has not been exercised? The full bench of the Orphans' Court places the decision on another ground, viz.: that a future interest though vested, can be put under a restraint against alienation if it has not come into possession; but this ground seems no more tenable than that taken by the auditing judge. It is doubtless true that a future contingent interest may be forfeited by alienation before vesting, §46, ante; but that is a totally different proposition from saying that a contingent future interest shall not be assignable before vesting. Law and equity have always lent themselves to the easy destruction of contingent interests, but that is very different from watching

over such interests so carefully as not to allow anyone having a contingent future interest to get rid of it. But further, even a clause of forfeiture upon alienation is not held valid when attached to interests vested in interest though not in possession, §47 et seq., ante. *McWilliams v. Nisly* and *Jaureche v. Proctor* contain only dicta. *Barker's Estate* cannot be considered as having made the state of the law in Pennsylvania any clearer."

⁷ 159 Pa. at 523.

⁸ See the question of discretion discussed, §537, post, to which heading the case in this aspect more properly belongs.

⁹ 159 Pa. at 523.

¹⁰ There is a serious question whether the clause against involuntary alienation applied to the share of the son. This point does not appear to have been called to the attention of the court. There is great force in the argument that the clause applied only to the trust for the maintenance and support of the family of which the share of the son in the remainder was not a part. Such a construction is supported by the case of *Moore v. Deyo*, 212 Pa. 102 (1905).

on alienation qualified as to time was valid at law; that Goe's Estate¹ decided that such a restraint on alienation was valid for a limited period, that is, while the legacy was in the hands of the executor, and that, therefore, a restraint on the voluntary alienation of a future vested equitable interest is valid during the continuance of the trust. A restraint on alienation qualified as to time is probably void at law² and there seems to be no good reason for extending the doubt into equity. The learned judge failed to observe, however, that the clause in the case at bar restrained only involuntary alienation, and that the case before him was that of a voluntary alienation, and that in Goe's Estate³ the court awarded the fund to the assignee as against the attaching creditor. Barker's Estate, therefore, seems to be inconsistent with the real decision in Goe's Estate. The learned judge got around this point by saying that an assignment for the payment of debts was the same as the taking of the estate by execution for the debt. It is submitted, however, that this is a confusion of the two kinds of alienation. They should be kept separate and distinct, and the one does not include the other.⁴

Hartman's Estate

240. In Hartman's Estate⁵ the cestui que trust had been sent to jail for failure to support his wife. He then made an assignment of his interest to his wife, and she endorsed thereon an acceptance thereof and a consent to an order of discharge, which order was accordingly made. On the audit of the executor's account, the assignment to the wife was presented, and the order of the court below directing the payment to her was, on appeal, reversed by the Superior Court. The clause was against both voluntary and involuntary alienation. The opinion of the court turned on the character of the claim for which the assignment was made, and the decision was

¹ 146 Pa. 431 (1892), §223, ante, and Beck's Est., 133 Pa. 51 (1890), §222, ante.

² See §204, ante.

³ 146 Pa. 431 (1892), §223, ante.

⁴ See §173, ante, as to distinction between voluntary and involuntary alienation.

⁵ 31 Super. Ct. 152 (1906). The words

of the will, unfortunately, are not given in full, and it is somewhat difficult to tell whether the interest was legal or equitable. It is considered as equitable, as Beaver, J., in the Superior Court, at p. 154, expressly said that an active trust was clearly created, and the learned judge probably had before him the exact words of the will.

based on *Board of Charities v. Lockard*,⁶ without noticing that that was a case of a life estate, and the case at bar was a case of an absolute interest. The question of the validity of the restraint when imposed on an absolute equitable interest apparently was not called to the attention of the court.

Fleming's Estate

241. In *Fleming's Estate*⁷ the testator gave his real estate in trust for fifteen years, the trustees during that period to pay over the net income quarterly to his six children, who were specifically named, with the following clause: "None of my children shall during said term have the right to sell, pledge or in any other way anticipate their respective shares in the rents or income of said real estate, nor shall they have the power to sell, mortgage or otherwise encumber their prospective interests therein." The testator further provided that at the expiration of fifteen years from his decease, the trustees should divide the estate equally among the six children, naming them, "or if any of my said children shall have died before the time for such division, to the children then living and the heirs at law or devisees of the child or children who shall have died. * * * * The death of any of my children shall not in any wise affect the provisions of this trust, but the share or shares of the one, or of those, so dying shall descend to him, her or their heirs at law or devisees subject to all the conditions herein named." A son, George, died during the fifteen-year period, having first made a will whereby, among other things, he directed the payment of his debts. The case arose on a controversy between the creditors and other devisees of George over his interest in his father's estate, the land having been sold in partition proceedings, at the expiration of the fifteen years. The Supreme Court held, in an opinion by Mr. Justice Brown, that the creditors were not entitled to come in on the fund. The learned judge said that George could not have disposed of the interest by conveyance *inter vivos* during the fifteen-year period, nor could the same have been taken in execution for his debts during that time, and as George's interest ceased when he died, and it then went to his devisees or heirs, the only power George could exercise was to devise it, and as the provisions of the will were that

⁶ 198 Pa. 572 (1908).

⁷ 219 Pa. 422 (1908).

the devisees should take subject to the restraints in the will, they also took subject to the clause against involuntary alienation, and consequently, the devisees of George, who were his creditors, could not take under his will. There is, however, a hiatus in the reasoning of the learned judge. If the clause in the will providing exemption from involuntary alienation applied to George's devisees, the effect it would have would be to exempt their interest from the claims of their creditors, and, it is submitted, it is a confusion in thought to say that the clause operating on the devisees, would have the effect of limiting the power of George to will to his creditors.⁸ Furthermore, there was no case of involuntary alienation before the court. The creditors claimed under the provisions of the will. It is material in this case to ascertain the interest which George took. There can be no question but that he took an absolute interest. It went after his death to his heirs or devisees, and the prohibition against voluntary alienation during his life or during the fifteen-year period could not operate to cut down the estate in fee.⁹ It is immaterial whether George's interest was vested or contingent; in either case the effect of the decision of the court was to sustain the validity of the clause as imposed on an estate in fee. The decision is difficult to support on any ground. The will expressly provided that if any child died, his share was to be paid to his heirs at law or devisees. The process of reasoning by which the court declined to give effect to this clause as to such of the devisees of the son who happened to be his creditors, is incomprehensible.

Rockhill's Estate

242. In *Rockhill's Estate*¹⁰ although the words of the will are not given, it appears that there was a gift in trust for the payment of debts, the carrying on of the testator's business then for his wife for life, and after her death, for

⁸ It may be argued that this case is sustainable on the ground discussed §286, post, that the clause against involuntary alienation, when imposed on a life estate, operates when the life tenant has a general power of appointment to exempt the assets which he appoints from the claims of his creditors. The answer to this is that we have not here a case

of a life estate with a power of appointment, but the case of a fee. The added alternative devise to the devisees of George can have no other effect than to give him a power of appointment, which is superfluous in the case of a fee.

⁹ See this question discussed, §174, ante.

¹⁰ 29 Super. Ct. 28 (1905).

his children for life, and upon the decease of any of them, the children of the deceased child should take their parent's share of the income, and the principal should be divided on the death of the last grandchild. The exact words as to the distribution of the principal are not given. It is not clear whether the remainders to the children were vested or contingent.¹ The court, however, said that the statute of uses did not apply, and that they were equitable.² The clause against alienation was as follows: "The income shares or estates given or created by this will shall belong and be received only by those whom I have designated, and in no manner shall be assigned or transferred by them or be made liable to attachment, execution or other process, for their debts or liabilities, and their receipts alone shall discharge the trustees."³ One of the grandsons made an assignment as security for a loan. The court said that the clause covered the share of the grandson in the principal, and on the authority of *Beck's Estate*,⁴ said that the clause was valid and that the assignee took nothing. The arguments of counsel for the appellant and the opinion of the court seem to have turned on the question whether the trust was active, and the real point in controversy, to wit, whether such a clause was valid when attached to the equitable fee in remainder, was entirely overlooked, as was also the other point of construction noticed in the note.⁵

*Pennsylvania Law as to Validity of Clause Prohibiting
Voluntary Alienation*

243. All these cases, from *Barker's Estate*⁵ to *Rockhill's Estate*,⁶ seem to favor so strongly the validity of the clause, that it is almost possible to venture as a statement of the law the proposition that a prohibition of voluntary alienation,

¹ The gift was to the grandchildren as a class, and each grandchild probably took a vested remainder subject to be opened and let in grandchildren born before the death of the children of the testator.

² See §§127, 128, ante.

³ There is room to argue that this clause applied only to the income. The testator says expressly "income shares." The court, however, without noticing

this, said that the language was broad enough to cover the share of a grandson in the principal. On this point, also, the decision is open to objection.

⁴ 133 Pa. 51 (1890), stated §222, ante. *Beck's Est.* was a case of voluntary alienation of a legal interest and can be explained.

⁵ 159 Pa. 518 (1894), stated §239, ante.

⁶ 29 Super. Ct. 28 (1905), stated §242, ante.

when attached to an absolute equitable interest, is valid when qualified as to time, with the question open as to the time as to which the restraint is valid. It has already been submitted⁷ that a prohibition qualified as to time is void at law. No reason has been advanced in any of these cases why the prohibition should be valid in equity when it is void at law. It is against public policy to extend the validity of such restraints, and it is therefore apprehended that these cases, in so far as they sustain the validity of the clause, are likely to be shaken.

Forfeiture for Involuntary Alienation

244. A clause of forfeiture upon the involuntary alienation of an absolute legal interest is valid.⁸ The rule should be the same in equity, and such probably is true, although no case on the point has been found.

Preliminary Discussion as to Prohibition of Involuntary Alienation

245. If a prohibition of the involuntary alienation of a legal title, whether absolute in personal property or a fee in real estate, is invalid, and it seems on a careful sifting of the authorities that such is the law,⁹ then, on the principle that equity follows the law, a like restraint on a similar estate in equity should be void. There is nothing in the nature of a trust which calls for any distinction, and the clause, if valid, violates the same principle in equity that it does at law,¹⁰ and there are several decisions and dicta against the validity of the clause.¹¹ It will appear, however, that the law is in doubt. The cases will now be discussed.

⁷ See §204, ante.

⁸ See §217, ante.

⁹ See §224, ante.

¹⁰ See §252 to §254, post, for discussion of the principle involved.

¹¹ *House v. Spear*, 1 W. N. C., 34 (1874); this, however, was not a spendthrift trust except under the dictum of *Winthrop Co. v. Clinton*, 196 Pa. 472 (1900), see §274, post; *Willard v. Davis*, 3 Penny. 86 (1882), stated §221, ante; *Penrose, J.*, in *Barker's Est.*, 159 Pa. 518 at

525 (1894), stated §239, ante; *Penrose, J.*, in *Francis's Est.*, 17 Pa. C. C., 163 at 166 (1895). In *Norris v. Johnston*, 5 Pa. 287 (1847), the provision in the will was: "This share of my estate, excepting the interest thereof, shall not be subject," etc. The court said that the income was not subject to the clause, but intimated that the remainder was. The only question before the court was as to the income.

Keyser's Appeal

246. In *Keyser's Appeal*¹ the testator devised one-half of his residuary estate to trustees in trust for his three sons and their heirs in equal shares, giving the trustees certain power as to the improvement of his real estate, etc., and after the expiration of ten years, authorizing them to make partition if they should think best, and set out the share of the sons in severalty, with the proviso that no part of the property devised to the sons should at any time be liable to be sold for the payment of any of their debts, etc. The time fixed in the will having expired, and the partition having been made, one of the sons filed a bill in equity against the trustees for a conveyance of the legal title to his share. Decree was entered as prayed for. On appeal, affirmed. Mr. Gray² makes the following observation on this case: "In *Keyser's Appeal* the trustees had no duties, and so the cestui que trust had at once the legal interest," (therefore) "*Keyser's Appeal* would not decide, as it has been sometimes supposed it did, that an equitable fee cannot be subject to a spendthrift trust, for in *Keyser's Appeal* the interest attached was not equitable but legal." It is submitted that the learned author misconceived the case. There was no interest attached. The cestui que trust was calling for the legal title, therefore no question as to involuntary alienation was before the court.³

Mackrell v. Walker

247. In *Mackrell v. Walker*⁴ there was a trust which, under the construction adopted by the court, created an absolute estate in the beneficiaries. There was a clause prohibiting voluntary alienation, and there was a proviso giving the trustee discretion to terminate the trust after the beneficiaries arrived at the age of twenty-one years. The trustee terminated the trust when they reached the age of twenty-one, and conveyed the trust property to each of the cestuis que trustent according to their respective shares. One of them then offered to sell his interest in a portion of this property,

¹ 57 Pa. 236 (1868), see §220, ante.

² *Restraints on Alien.*, 2 ed. (1895), §124g.

³ See §131, ante, as to statute of uses. See §139, ante, as to necessity for a con-

veyance, and contrast this case with *Rife v. Geyer*, 59 Pa. 393 (1868), stated §314, post.

⁴ 172 Pa. 154 (1895).

and the case came before the court on a case stated as to whether he had marketable title. The court held that he had. The point involved in the case, although the opinion of the court is not very clear, seems to be that the trustee could exercise the discretion notwithstanding the clause against alienation.⁵

Minnich's Estate

248. In *Minnich's Estate*⁶ the provisions of the will were as follows: "The part or share coming to my son Jacob, I give and bequeath to my brother Abraham, in trust for the use and benefit of my said son Jacob, said trustee to invest the funds at interest at his discretion, either in real estate or otherwise, and pay to my said son the interest thereof as often as it may accrue, and if invested in real estate to give him the income or occupation of same, providing he pays all taxes upon it and keeps the same in reasonable repair from time to time during the term of his life, and in case of neglect, said trustee shall pay the taxes and make the necessary repairs, and deduct from his annual income the amount so expended, and pay annually to him the balance; and if invested at interest, said trustee shall pay the annual state tax on the same, and deduct it from the income, and the same is not to be in any wise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him." At the audit of the trustee's account, the son claimed the fund absolutely. The court held that Jacob was not entitled to terminate the trust and have the principal paid to him, and relied on the clause prohibiting involuntary alienation in arriving at this conclusion. No cases were cited, and the question was disposed of in a very short opinion. The court seemed to assume the validity of the clause and to have viewed the case solely from the point of view of whether in a valid spendthrift trust, the cestui que trust could obtain the corpus. It was true that there were active duties in the trustee, but that circumstance does not prevent the cestui que trust from obtaining the legal title when he has the absolute interest, and as the whole estate was placed in trust with the income to be paid to Jacob, it must necessarily follow that the principal followed the income and Jacob took the whole in fee,

⁵ As to the validity of the discretion to terminate, see §539, post.

⁶ 206 Pa. 405 (1903).

and that that fee was equitable. If the clause is valid at law as well as in equity, the presence of the clause is no bar to the termination of the trust. If a trust of an absolute interest is valid,⁷ the clause does not figure in the decision, as the cestui que trust could not terminate the trust even if the clause was omitted from the will. If the clause is invalid at law and valid in equity, and a trust of an absolute interest is void, this case is authority for the proposition that a prohibition against the involuntary alienation of an equitable estate is valid; because the court will sustain the trust in order to keep the title in equity where the clause will be valid. The case is ambiguous and of doubtful value as an authority.

Wright's Estate

249. In Wright's Estate⁸ it seems as if there was an absolute equitable title. There was a clause prohibiting involuntary alienation which the court sustained as against a claim of a creditor of the cestui que trust.

Shower's Estate

250. In Shower's Estate⁹ there was no clause against involuntary alienation. The court said that the cestui que trust could not terminate the trust,¹⁰ and then concluded, by way of dicta, that it was exempt from involuntary alienation.¹ This case, while lending countenance to the principle that the clause attached to an equitable fee is valid, is not a direct authority on the question under discussion.

Pennsylvania Law as to Validity of Prohibition of Involuntary Alienation

251. The result of these cases is that no statement can be ventured as to the validity of the clause prohibiting involuntary alienation when imposed upon an equitable fee. Reason,² authority and the dicta³ of some of the most eminent judges

⁷ See §524, post, as to the law on this point.

⁸ 28 Pa. C. C., 540 (1903); case imperfectly reported; exact words of the will not given.

⁹ 211 Pa. 297 (1905). See this case stated §522, post.

¹⁰ As to this, see §524, post.

¹ As to this, see §275, post.

² See discussion, §§252, 254, post.

³ See §245, ante, n. 11.

are against the validity of the clause. Neither Keyser's Appeal⁴ nor Mackrell v. Walker⁵ are authorities to the contrary, although they are sometimes supposed to be to that effect. The remarks in Shower's Estate⁶ are plainly dicta. The remarks in Minnich's Estate⁷ are strongly in favor of the validity of the clause and this case has been followed in the court below in Wright's Estate.⁸ Minnich's Estate, is, however, a doubtful authority, as there was no involuntary alienation involved. It is perhaps the feeling of the profession and the real position of the Supreme Court, that such a clause is invalid when imposed on an equitable fee.

Preliminary Discussion of Reasons For and Against the Validity of Prohibition of Involuntary Alienation

252. The doubtful state of the law as to the validity of the clause prohibiting involuntary alienation when imposed on a legal or equitable fee makes it necessary to notice at some length the arguments for and against the validity of the clause. The same arguments are applicable to the clause when it is attached to an equitable life estate, and this part of the discussion will be again referred to⁹ in that connection as bearing on the question whether the doctrine of so-called spendthrift trusts is to be extended or kept within narrow bounds.

Arguments Against the Validity of the Clause

253. The clause is admittedly void at common law when attached to legal life estates and to absolute interests. The reason why it is void at common law¹ is that there are positive statutes making all property liable to be taken in execution for the payment of the debts of the debtor, and if the clause is sustained, a private individual¹ is permitted to nullify to that extent the solemn act of the legislature.² There can be no division of opinion as to the impropriety, as well as the impossibility, of allowing the law of the land to be set aside by a private individual in such manner as that. Now,

⁴ 57 Pa. 236 (1868), stated §246, ante.

⁵ 172 Pa. 154 (1895), stated §247, ante.

⁶ 211 Pa. 297 (1905), stated §522, post; see §250, ante.

⁷ 206 Pa. 405 (1903), stated §248, ante.

⁸ 28 Pa. C. C., 540 (1903), see §249, ante.

⁹ See Chap. 13, §269, ante.

¹ This reason does not appear to be brought out by Mr. Gray.

² See remarks Sharswood, J., in Keyser's App., 57 Pa. 236 (1868), at bottom p. 241.

on the principle that equity follows the law, the same rule should apply to trusts. No reason has ever been suggested why the trust is, in its nature, such that this principle cannot apply. Furthermore, equitable property is just as liable for debts as legal property, and a man should not be permitted to nullify an act of the legislature at equity any more than he can at law.³

Arguments in Favor of the Validity of the Clause

254. (1) That a man may do as he will with his own, and he can therefore annex a clause to his gift exempting it from involuntary alienation in the hands of the donee. This gives to the maxim a force which is totally unwarranted, because it can be rightly used only when it is understood to mean that he can do as he will with his own subject to the law of the land.⁴ Furthermore, if this principle applies in equity, why does it not apply at law? (2) The reason advanced by Mr. Justice Miller,⁵ also noticed by Mr. Chief Justice Gibson in *Lancaster v. Dolan*,⁶ that alienability is not the necessary incident of a life estate and is a doctrine engrafted on the common law by the English courts of equity. In this reason, as pointed out by Mr. Gray,¹ the learned judge overlooks the history of the law, which is that legal interests were alienable at law, and that equity, in this respect, followed the law. (3) The notion that the clause against involuntary alienation is

³ The course of decision in this particular in Pennsylvania is very striking. In Pennsylvania, in early times, equity and equity jurisdiction and all power of a chancellor, were looked upon with fear and dread, and equitable doctrines were introduced sparingly and with great hesitation. Now, however, in this very same State, the power of the chancellor has been carried to lengths which would probably startle the most high-handed lord chancellor who ever occupied the woolstack. In Pennsylvania the chancellor nullifies the solemn law of the land when the creditor endeavors to take in execution the equitable assets of his debtor, and when the clause is present, says that the law

declared by the legislature shall not apply, although there is no warrant in that law for any such exception. It is no answer to this to say that the chancellor in so doing only carries out the express wishes of the donor, for that wish is admittedly void at law and can only be effective in equity because of the interposition of the chancellor.

⁴ For a further discussion of this point, see §2, ante.

⁵ In *Nichols v. Eaton*, 91 U. S. 716 (1875).

⁶ 2 Rawle, 231 (1829), stated §590, post.

¹ *Restraints on Alien.*, 2 ed. (1895), §256.

repugnant to a legal estate, but not to an equitable estate. As Mr. Gray points out,² no reason is given why there should be any distinction between law and equity. And, furthermore, if the clause is not repugnant to an equitable estate, why should it be held invalid in the case of an equitable fee, and valid in the case of an equitable life estate? (4) That the only objection to the invalidity of the clause is that it defrauds the creditors of the beneficiaries, and that it does not defraud them because they extend credit to their debtor presumably with knowledge of the presence of the clause. It does not follow that they do not know of the presence of the clause, or that they know that the debtor has this particular piece of property, and furthermore the assumption that this is the only objection is an assumption for which there is no warrant. It can easily be shown that the objection is of no weight, because in many cases the instruments containing such clauses are not of record, and very rarely does a case arise where it can be shown that the creditor actually knew of the presence of the clause. Even if the creditor did know of the clause, this pertinent question might be asked: upon what is he entitled to rely—upon the law of the land, which makes that property liable to his claim, or upon the attempted exemption created by a private individual? (5) The analogy of the statutes of exemption advanced by Mr. Justice Miller.³ Mr. Gray⁴ says that this analogy is imperfect because those statutes were intended to help the poor, and the clause in question tends to enable the rich to live without paying their debts. There is also the further objection to this analogy, that the statutes of exemption are of equal application to all members of the community, while the clause in question operates to destroy that equality and give to certain members an additional exemption which others do not have. Therefore, the courts, which sustain the clause, by so doing destroy, in that respect, one of the most boasted principles of American jurisprudence—the equality of all men before the law.⁵ (6) It has been said that the donor has an individual right of property in the execution of the trust, and to deprive him of it

² *Restraints on Alien.*, 2 ed. (1895), §257.

³ *Nichols v. Eaton*, 91 U.S. 716, (1875).

⁴ *Restraints on Alien.*, 2 ed., (1895), §263.

⁵ For a very excellent summary of the arguments for and against the validity of the clause, see Gray, *Restraints on Alien.*, 2 ed. (1895), §251, et seq.

would be a fraud on his generosity.⁶ The notion arose at a time when equity was in its infancy in Pennsylvania and is to be received with caution, and until a case has arisen in which a donor has actually appeared before the court and been protected in the assertion of this so-called right of property it may be seriously doubted whether there is any such right of property at all. It is certainly contrary to all the principles of the law of trusts, to say that the donor has any interest in the property after he has fully created the trust and the cestui que trust has acquired a vested right.

⁶ Gibson, C. J., in *Holdship v. Patterson*, 7 Watts, 547 at 551 (1838), quoted in *Carmichael v. Thompson*, 8 Sad. Cases, 120 at 124, 125 (1886).
by Mehard, P. J., in the court below

CHAPTER 13

EQUITABLE LIFE ESTATES. INVOLUNTARY ALIENATION

(SPENDTHRIFT TRUSTS)

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Forfeiture for Involuntary Alienation

266. No Pennsylvania case has been found of a clause of forfeiture upon involuntary alienation attached to an equitable life estate. Such a clause is valid when attached to a legal life estate,¹ and there is no reason why it should not have the same effect in equity.

Prohibition of Involuntary Alienation

267. A prohibition of involuntary alienation, that is, a proviso that the title cannot be taken away from the owner by any act of law, is valid in Pennsylvania when attached to an equitable life estate.² The case presented is what is generally known as a spendthrift trust, and the law is the same whether the subject matter is personal property or real estate. This is past dispute, and no attempt is made here to overthrow this doctrine in so far as life estates are concerned. We are thus introduced to the subject of so-called spendthrift trusts, which will now be examined in detail.³

¹ See §229, ante.

² Except that the question of the validity of the proviso has not been passed on, so far as proceedings in eminent domain are concerned.

³ The clause of prohibition is void at common law, see §226, ante, and probably is void in Pennsylvania as to a legal life estate, see §228, ante.

Spendthrift Trust Defined

268. The term spendthrift is inaccurate, since the restriction may be imposed upon the interest of one who is not a spendthrift. The character of the cestui que trust has nothing to do with the matter. The case differs from other trusts only in so far as the equitable interest of the cestui que trust is subject to the prohibition against involuntary alienation, and bears the same relation to express trusts in general that the clause against anticipation does in a married woman's trust. The term spendthrift is ambiguous, and its use is a hindrance to clear thinking.⁴ A so-called spendthrift trust may be defined as an express trust in which there is a clause prohibiting the involuntary alienation of the equitable interest of the cestui que trust. From the loose use of the term by the judges in Pennsylvania, it may perhaps be gathered that the term also includes the case where there is a prohibition upon voluntary alienation.⁵ No definite statement on this point can be made, but the subject has been discussed upon the theory that the two forms of alienation are separate and distinct, and that a prohibition of one does not prohibit the other.⁶

Objections to the Validity of the Clause

269. The reasons which have already been noticed⁷ in the case of a prohibition of the involuntary alienation of an absolute interest, legal or equitable, apply to a similar prohibition upon an equitable life estate. If the arguments against the validity of the clause have any weight, and it is submitted that they have, the doctrine of spendthrift trusts will be regarded as unsound, and to be evaded whenever reasonably possible to do so.⁸ In no case in Pennsylvania does the question

⁴ Called "spendthrift son trusts" by the Master in the court below in *Handy's Est.*, 167 Pa. 552 at 555, (1895) and by counsel in *Overman's App.*, 88 Pa. 276 at 279 (1878). As they may be created for females as well as males, this term is also objectionable. In the syllabus to *Jones's Est.*, 199 Pa. 143 (1901), the reporter speaks of a strict spendthrift trust. The interest of the cestui que trust is either subject to the clause prohibiting involuntary alienation or it is not. It is difficult to understand the difference between

a strict spendthrift trust and any other kind of a spendthrift trust. No warrant is to be found in the case itself for such a distinction.

⁵ See §319, post.

⁶ See §173, ante.

⁷ See §§252-254, ante.

⁸ It is submitted that there is no reason why the whole doctrine should not be repudiated. As the validity of the clause prevents alienation, the removal of that restraint cannot affect any title, and there is, therefore, no reason to further perpetuate the error, if it be one.

appear to have been really discussed or any of the reasons for or against the validity of the clause noticed. The position of the court, therefore, in sustaining the validity of these trusts, is open to more serious objection than if they had consciously adopted the position on the ground that it was desirable from the point of view of public policy, after careful examination of the arguments pro and con.⁹

Language Necessary to Create—General Principles

270. The prohibition is imposed by the donor in creating the trust, and his intention must be clearly expressed. A few examples will sufficiently illustrate the language necessary.¹⁰

⁹ The expressions of the judges in Pennsylvania are conflicting. In some cases the judges approved of the validity of the clause prohibiting involuntary alienation for one reason or another: Smith, J., in *Fisher v. Taylor*, 2 Rawle, 33 at 37 (1829); Gibson, C. J., in *Holdship v. Patterson*, 7 Watts, 547 at 550, 551 (1838); Coulter, J., in *Norris v. Johnston*, 5 Pa. 287 at 289 (1847); Woodward, J., in *Overman's App.*, 88 Pa. 276 at 286, (1879). In other cases the expressions were against the desirability of the clause: Gibson, C. J., in *Hamersley v. Smith*, 4 Wharton, 125 at 127 (1838); Agnew, C. J., in *Overman's App.*, 88 Pa. 276 at 281 (1878); Bland, J., in the court below in *Seitinger's Est.*, 170 Pa. 500 at 519 (1895); Sharswood, J., in *Keyser's App.*, 57 Pa. 236 at 241 (1868).

¹⁰ "In trust to pay over the income to my son * * for life, without being subject to his debts or liabilities, at his decease to his children;" dictum, *Shankland's App.*, 47 Pa. 113 (1864); stated §313, post. "The income is to be for their respective, sole, separate and exclusive use and benefit, * * * so that the same shall not be in any manner pledged, appropriated, disposed of, or parted with by anticipation, or before the same shall have accrued and become payable; nor be subject to execution, attachment or sequestration for any debts or lia-

bilities whatever." *Thackara v. Mintzer*, 100 Pa. 151 (1882). "The interest * * shall in no way be subject, responsible or liable to or for the existing or future contracts, debts or engagements of either of my said children; nor shall said interest be liable to attachment for any debt of either of my said children; nor shall same be assigned or transferred by either of my said children by way of anticipation, and * * the receipt or other acknowledgment of such child for said interest, when so paid, shall be the sufficient and only discharge of said trustee for such payment." The cestui que trust was dead, and the sole controversy seems to have been over the liability of the principal of the trust to his creditors. The court held he took a life estate only; consequently the principal would not have been liable for his debts even without the clause: *Mannerback's Est.*, 133 Pa. 342 (1890). (1) "So the same shall not be in his power or liable to his debts, contracts or engagements." (2) "Without any liability for any debts, contracts or engagements which he may make." *Mehaffey's Est.*, 139 Pa. 276 (1891), stated §316, post. "For her sole and separate use, during her natural life, so that she may receive the income, rents, issues and profits thereof, as and when the same shall have accrued and become payable, with her own separate hand or

as she by her sole and separate act may direct, and so that the same shall not be in any manner pledged, appropriated, disposed of, or parted with by anticipation or before the same shall have accrued and become payable, and shall not be in any manner liable for the debts or to the interference or control of any husband whom she may marry, or be subject to execution, attachment, sequestration or adversary proceedings of any sort for her own debts, or for any debts or liabilities whatever; and upon, and from and after her decease, in trust for the use of her issue living at her death." *Seitzinger's Est.*, 170 Pa. 500 (1895). "Free and discharged from and so as not to be in any way liable for his debts, now contracted or which he may hereafter contract, and from all judicial process to levy upon and attach the same for the payment thereof." *Wanner v. Snyder*, 177 Pa. 208 (1896), stated §233, ante. "Her receipt to be the only discharge therefor:" dictum, *Penrose, J.*, in *Boyd's Est.*, No. 1, 199 Pa. 487 at 491 (1901). The learned judge cited *Stambaugh's Est.*, 135 Pa. 585 (1900), stated §273, post. *Winthrop Co. v. Clinton*, 196 Pa. 472 (1900), stated §274 post; *Vaux v. Parke*, 7 W. & S. 19 (1844), stated §293, post. The remarks in *Boyd's Est.*, were dicta, as the question came up as to the validity of the appointments under the will of the cestui que trust who was dead, and the validity of those appointments turned on the question whether she took a life estate with power of appointment, or an absolute interest. The court said that the trust created for her was active, and inferred from the presence of the clause that it was intended she should have a life estate. That reasoning, however, it is respectfully submitted, does not meet the point in the case. The quantum of her estate depends on the words of limitation used, and is entirely independent of and is irrespective of the activity or

non-activity of the trust or the presence or absence of a separate use clause or a clause prohibiting involuntary alienation. Suppose all those clauses were absent in this case, and suppose the trust were dry. The estate being personal, and the cestui que trust never having terminated it, it would stand after her death exactly the same as any one of the trusts above mentioned. The same clause was present in *Kay v. Scates*, 37 Pa. 31 (1860), but was not noticed by the court, and the trust terminated, notwithstanding. When such a clause occurred in a sole and separate use, it fell with the use and had no effect: *Ogden's App.*, 70 Pa. 501 (1872). "Not to be in anywise liable for any debts owing by my said son, nor for any debts that may be hereafter contracted by him:" *Minnich's Est.*, 206 Pa. 405 (1903), stated §248, ante. "It is my distinct will and desire, and an express condition of the gifts, bequests and devises hereinbefore contained, that none of the effects, real, personal or mixed, above bequeathed to Julius Hartman and Mrs. Katharina Cartus, or any of my other children, shall be liable to be attached or seized, or in any manner pledged, appropriated, disposed of or parted with by anticipation, or before the same shall have accrued or become payable, but the whole amounts of their respective shares shall be for their respective sole, separate and exclusive use and benefit, and shall be paid over and distributed by my executor or administrator directly to them, as the parties entitled thereto, without diminution for the payment of any debts or liabilities whatever in transit from said executor or administrator to them:" *Hartman's Est.*, 31 Sup. Ct. 152 (1906), stated §240, ante. The learned reader will observe that the tendency is for the clause to become more verbose and redundant. Why this should be so it is difficult to say. The clause prohibiting involuntary aliena-

Preliminary Discussion of Extreme Cases

271. There are a number of cases in which the Supreme Court has said that a spendthrift trust was created which are open to serious objection. The objection to these cases is predicated upon the proposition¹ that the principle sustaining the validity of the clause is unsound and against public policy, and must therefore be carefully applied and confined to the narrowest possible limits. The intention, therefore, to impose the prohibition must be clearly expressed, and the language of the donor strictly interpreted. These cases are as follows:

Smith v. Savidge

272. In *Smith v. Savidge*² the testator provided as follows: "My son L. is to have \$2,000 out of my estate before a distribution is made, and he is to hold all my clothing without charge, and I do appoint my son G. as a committee for my son L., to take charge of all his money and pay him the interest and so much of the principal that will give him a comfort support, and after his death, of my son Levi,

tion may be imposed by the exercise of a power; *Ingersoll's Est.*, 167 Pa. 536 (1895). The learned reader will here observe the distinction between this and the case of a sole and separate use clause, which latter cannot be imposed by the exercise of a power. See §579, post. *In the following cases the words indicated were held insufficient to prohibit involuntary alienation:* To pay income "to be for his own use and benefit or to such person as by his order in writing, he may authorize to receive the same;" *Girard Life Ins. Co. v. Chambers*, 46 Pa. 485 (1864). "Income to be paid into the proper hands" of the cestui que trust during life; *Harrison v. McCana*, 11 W. N. C. 239 (1882). "I direct my executor to make sale of the coal of the west end, when the said S. arrives at the age of twenty-one years; and the proceeds to be under the control of my executor, and to go to the use of the said A. and her four named children, when necessity

requires, share and share alike;" *Smeltzer v. Goslee*, 172 Pa. 298 (1896). In *King's Est.*, 147 Pa. 410 (1892), the testator directed his trustee to pay the income to his wife for life, upon her sole and separate receipt in writing, and not by anticipation, and then directed that the trustee should pay no part of the wife's income to her collateral relatives, and should prevent such relatives from entering the testator's residence. The court said that it was not a spendthrift trust, although these remarks were unnecessary to the decision of the case, as it does not appear that any question as to alienation was before the court or that the cestui que trust was seeking to have the legal title transferred. The only controversy was over the effect of the clause against anticipation upon certain payments of income. As to this point, see §§596, 597, post.

¹ Discussed §269, ante.

² 4 Penny. 320 (1884).

then all his estate shall be equally divided between all his children." The Supreme Court in an opinion by Gordon, J., held that the judgment creditor of Levi could not attach either the principal or income of the bequest. It appeared that Levi had been duly found to be a lunatic by inquisition, and the lunacy existed at the time he signed the judgment note, and as it did not appear that it was for necessities, there could be no recovery in any case. The learned judge said that it was clearly the law that a trust could be created for the protection of a spendthrift lunatic, etc., and inferred from the testator's use of the word committee that he intended such protection. Levi had only a life estate and had no interest in the principal except in the discretion of the trustee, and as it did not appear that the trustee had exercised the discretion, the decision was clearly correct as to the principal. There was no clause against involuntary alienation and the evidence of the lunacy was, it is apprehended, inadmissible, there being no latent ambiguity in the will.³

Stambaugh's Estate

273. In *Stambaugh's Estate*⁴ the testator directed that the share of the son should be placed in the hands of S., "whom I hereby appoint trustee for to hold the said sum for my son Moses, and the said trustee is to pay the interest accruing from the same to my son Moses, and after deducting taxes and necessary expenses, and after the death of my son Moses, I bequeath the principal to the heirs of my son Moses, share and share alike." The trustee paid part of the corpus of the estate to three children of the son Moses, Moses and the children joining in a release to the trustee for such payment. It appears that one of the children, Mary, was a minor at the time of this payment. An account of the trust was filed. The auditor in the court below came to the conclusion that the trust was active, and that therefore the payment by the trustee of a portion of the principal of the trust fund to Mary was improper, because she was at the time under the age of twenty-one years and her release invalid, but that the trustee was entitled to credit for the payment to the

³ A restraint on alienation imposed on the estate of a lunatic seems to be valid: *Royer's Executors v. Meixel*, 19 Pa. 240 (1852), *semble*; *Wilson's Est.*, 2 Pa. 325 (1845).
⁴ 135 Pa. 585 (1890).

other two children. The auditor admitted evidence of the insolvency of Moses just before the execution of the will. The exceptions to the auditor's report, among other things, alleged that the auditor erred in sustaining the payment to the other two children. Exceptions were dismissed by the court. On appeal, the Supreme Court reversed, Mr. Chief Justice Paxson delivering the opinion of the court, and inferring from the insolvency of Moses that the testator intended a spendthrift trust.⁵ Even if the release did bind the life tenant, the payment would have been improper, as the remainders were contingent. The remarks as to a spendthrift trust were therefore unnecessary, and as the case has been referred to as an extreme one, the dictum as to the spendthrift trust may well be disregarded by the Supreme Court whenever the question comes before it again.⁶ The concluding remarks of the court quoted in the note⁵ plainly indicate that the court felt that the decision was so extreme as to require qualification. What the difference is between a spendthrift trust, with respect to trustee and cestui que trust, and a spendthrift trust between cestui que trust and creditors, is difficult to understand. The inference from the insolvency of Moses was hardly justified. The court seemed to think that because he was insolvent he was a spendthrift, and because he was a spendthrift, the testator must necessarily have intended a spendthrift trust. The hiatus in the reasoning is apparent: a man is not a spendthrift because insolvent, and there was, therefore, no reason to suppose from his insolvency that Moses was a spendthrift, neither does it follow that because he was a spendthrift the testator intended a spendthrift trust. The ruling as to

⁵ The true ground is found in the opinion of the Chief Justice on p. 598. "The release of the life tenant does not bind him. The release of the alleged remaindermen does not protect the trustee. *Non constat* that the releasors will be the remaindermen at the death of Moses Stambaugh. If the trustee suffers by this ruling, it is the result of his own folly. * * It is to be observed that no question arises as to creditors. As between the trustee and his cestui que trust, we must give this will the effect of a spendthrift trust." The case so understood by

Green, J., in *King's Est.*, 147 Pa. 410 at 415 (1892); understood by the court below in *Seitsinger's Est.*, 170 Pa. 500 at 517 (1895), as going on the ground of construction that Moses was only to have a life estate.

⁶ From the report of the auditor it appears that no contention was made before him as to the payment to the other two children. The exceptions filed, however, very specifically complained of the finding as to them, and there is, therefore, no doubt that the matter was squarely before the court.

the admission of evidence of the insolvency was erroneous. There was no latent ambiguity in the will requiring explanation. The terms were perfectly plain, and there could be no doubt as to what the testator meant. On this point, the case may be considered as overruled by *Shoup's Estate*,⁷ where evidence of the insolvency of the cestui que trust was expressly excluded.

Cressler's Estate

273a. In *Cressler's Estate*⁸ there was a direction as follows: "As to any interest and estate which my son Daniel may take under this will, I direct the same to be held by my executor * * * in trust, the interest and income thereof to be paid to said Daniel * * * ." The interest of Daniel was sold under a vend ex. The auditor, W. Trickett, Esq., in the court below, whose opinion was affirmed on appeal by the Supreme Court,⁹ said, by way of dictum, the sale having occurred in the lifetime of the testatrix: "Even had it taken place after his mother's death, it would have conveyed no interest, for her will

⁷ 31 Super. Ct. 162 (1906). The very able opinion of Rice, P. J., at p. 166, is well worth quoting: "But while under the law of this commonwealth spendthrift trusts are not regarded with disfavor, yet they are not looked upon with such special favor as warrants the courts in construing a trust to pay the income of a fund to the testator's son for life, without more, to be a spendthrift trust, or, in case of such a gift, departing from the general rule that when the language of a will is clear and unambiguous a doubt suggested by extrinsic evidence cannot be permitted to affect the construction of the instrument. * * If parol evidence was admissible in this case to sustain a construction whereby the trust as to the fund in question would be converted into a spendthrift trust, it is difficult to see why such evidence should not be admitted in every case, no matter how clear and unambiguous the terms of the will, where a testator has given a share of his estate to one child absolutely, and has restricted his gift to another

child to the income of another share which he has put in trust. This would be in plain contravention of the general rule that extrinsic evidence will not be admitted to create a doubt, and thus affect the construction of a will which on its face is clear and free from doubt and needs no construction. We all concur in the conclusion reached by the court below, and in the reasons assigned therefor in the opinion filed by its learned president. His discussion of the questions involved, and of the distinctions between *Stambaugh's Est.*, 135 Pa. 585, (which in *Winthrop v. Clinton*, 196 Pa. 472), was conceded to be an extreme case, and the case at bar, renders further elaboration by us unnecessary." See also opinion of the court below in *Bremer's Sons v. Mohn*, 169 Pa. 91 at 93 (1895). It is submitted, therefore, that the statement of law in *Pepper & Lewis's Digest of Decisions*, Vol. 22, col. 38553 (1341), is hardly accurate.

⁸ 161 Pa. 427 (1894).

⁹ At p. 437.

converted the land into personalty, and gave Daniel the interest of his share of the principal for his life, so as not to be liable for his debts." It is difficult to see how, under the words of the will as given, there was any exemption from liability for debts, or how the fact that it was converted into personalty could have any such effect.

Winthrop Co. v. Clinton

274. In *Winthrop Co. v. Clinton*¹⁰ the provision in the will was to pay the net income to A. "for his use and support for and during all the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge," with a gift over after A.'s death. The Supreme Court, in an opinion by Mr. Justice Green, held that the creditors of A. had no claim on the income in the hands of the trustee. The learned judge quoted the language used in the will in *Stambaugh's Estate*,¹¹ without adverting to the extrinsic evidence considered by the court in that case as shedding light on the intention of the testator. The learned judge also referred to *Smith v. Savidge*,¹ without noticing that there was in that case the same inadmissible extrinsic evidence, and relied on the notion that the mere placing in trust implied a distrust. The case of *Girard Life Ins. Co. v. Chambers*,² where the creditor prevailed, and the words were "use and benefit," was distinguished on the ground that the word "support" was equivalent to sustenance, and the income could not be used for the sustenance of the cestui que trust if his creditors could take it away from the trustee, while "benefit" meant a more general use. The learned judge also said that there were other elements of distinction, but did not point out what they were, which is to be regretted, since the cases appear on careful examination to be indistinguishable. If the principle of this case is to prevail it should be carried to its logical conclusion, and a creditor who has furnished necessities for the sustenance of the cestui que trust should be permitted to recover. It is respectfully submitted that this case is too extreme to be safely followed, that the decision in *Girard Life Ins. Co. v. Chambers* represents the better view, and that there is no solid distinction between the two cases.

¹⁰ 196 Pa. 472 (1900).

¹¹ 135 Pa. 585 (1890), see §273, ante.

¹ 4 Penny. 320 (1844), §272, ante.

² 46 Pa. 485 (1864).

Shower's Estate

275. In Shower's Estate³ there was a direction to trustees to so control the shares of the cestui que trust that "they may enjoy the interest thereof only, but in no way impair or diminish the principal." Mestrezat, J., said, by way of dictum, that the testator "limited and restricted the use of the estate he gave his three children so that they could enjoy only the income thereof, *and without the right of anticipation, and not subject to the claims of their creditors* in the hands of the trustee." How the learned judge could read into the will words (indicated by italics) which were not there, is difficult of comprehension.⁴ The learned judge cited Stambaugh's Estate,⁵ entirely overlooking the fact that that case went on inadmissible extrinsic evidence, and followed the extreme decision of Winthrop Co. v. Clinton.⁶ It is bad enough to alter the words of the will on inadmissible extrinsic evidence, as was done in Stambaugh's Estate; it is, however, still more objectionable to add words without any extrinsic evidence at all, as was done in this case. As there were other grounds of decision assigned and no rights of creditors were involved, the remarks as to the spendthrift trust may be considered as dicta.

Notion That a Mere Putting in Trust Indicates Distrust

276. The learned reader will find that in a number of cases the court has said that the fact that the testator put the estate in trust indicates a distrust on his part of the beneficiary, and lends strength to the conclusion that a so-called spendthrift trust was created. This notion, it is submitted, is without weight and is a fallacy. Property may be put in trust for one or more reasons, and to say that when it may serve one or two of several purposes, that the creation of the trust indicates one purpose rather than the other, is to draw an unwarranted conclusion from the language of the testator. This notion was pressed on the Superior Court by the learned

³ 211 Pa. 297 (1905). See this case further discussed in §250, ante, as to spendthrift trusts of a fee, and §522, post, as to trust of an absolute interest.

⁴ This reasoning of the judge may be

considered as overruled by the decision in Shoup's Est., 31 Super. Ct. 162 (1906); see §273, n. 7, ante.

⁵ 139 Pa. 585 (1890), stated §273, ante.

⁶ 196 Pa. 472 (1900), stated §274, ante.

counsel for the appellant in *Kunkel v. Kemper*,⁷ and was repudiated by the court. It may therefore be said that it is no longer the law. This is somewhat the same fallacy as that involved in the proposition, that putting an estate in trust indicates an intention to cut down the estate previously given.⁸

Summary of the Extreme Cases

277. It is apprehended that all the cases which have just been noticed are too extreme to be followed. In *Smith v. Savidge*⁹ there was no clause prohibiting involuntary alienation at all. In *Stambaugh's Estate*¹⁰ the court went on the inadmissible evidence of the insolvency of the cestui que trust, and the case may be considered as overruled by the decision in *Shoup's Estate*.¹ The remarks in *Cressler's Estate*² and in *Shower's Estate*³ were plainly dicta. In *Winthrop Co. v. Clinton*⁴ the court followed the discredited decision in *Stambaugh's Estate*,¹⁰ and *Shoup's Estate*¹ may be regarded as also overruling

⁷ 32 Super. Ct. 360 (1907). See also *Shoup's Est.*, 31 Super. Ct. 162 (1906). The opinion of Rice, P. J., on this point in the latter case at p. 166, is well worth quoting: "But it is argued that, the mere creation of the trust for a son, while reposing confidence in others 'contrary to the usual order of things,' is enough in itself to raise a doubt as to the intention of the testator, thus taking such a case out of the general rule last stated. This argument, as applied to this case, is based largely on the distinction which the testator made between his only son and his married daughter. But assuming for a moment, as the learned counsel contends, that this indicates that the testator had less confidence in the former than in the latter, it seems to us a non sequitur to say that it also gives rise to doubt whether the language of the gift of \$10,000 in trust to pay the income to the son for life fully expresses the testator's intention as to the right of the son to subject the same to liability for his debts and engagements. The language of the gift to the son being clear and unambiguous is not rendered doubt-

ful in meaning by the mere fact that the gift to the daughter was not restricted to the income. Why the testator made this difference is matter of speculation; but inability to discover from a perusal of the will the reasons which influenced him to make the distinction is one thing, while to doubt whether the will fully expresses his intention is another and quite different thing. The former, standing alone, is no ground for resorting to extrinsic evidence. Presumably, withholding the principal from the son, and giving him the income only, constituted the full measure of restriction upon the son's possession and enjoyment of that part of the estate which the testator deemed wise under the circumstances." *Kuntaleman's Est.*, 136 Pa. 142 (1890), accord.

⁸ As to which, see §522, post.

⁹ 4 Penny. 320 (1884), stated §272, ante.

¹⁰ 135 Pa. 585 (1890), stated §273, ante.

¹ 31 Super. Ct. 162 (1906), see §273, ante, n. 6.

² 161 Pa. 427 (1894), stated §273a, ante.

³ 211 Pa. 297 (1905), stated §275, ante.

⁴ 196 Pa. 472 (1900), stated §274, ante.

Winthrop Co. v. Clinton. It is, therefore, apprehended that it is the law that the clause prohibiting involuntary alienation must be clearly expressed, and that the principle of law sustaining the validity of the clause is so objectionable and so contrary to common honesty and the principles of public policy, that it is to be applied only in a case where the court is forced to apply it by precedent, and then only if the clause is so plainly expressed that there can be no doubt as to the meaning.

Clause Void When Imposed by Settlor Upon Interest Reserved to Himself

278. The clause prohibiting involuntary alienation is invalid when imposed by the settlor of a trust upon the interest reserved to himself by the settlement, whether the interest reserved is for life or in fee, and the law is the same whether the settlement is made by a man or a woman.⁵ A clause of forfeiture upon involuntary alienation of the interest reserved to the settlor is, in like manner, void.⁶ No Pennsylvania case on this point has been found. The learned reader will observe that in these cases the creditor may proceed on the theory that the deed is valid, but that nevertheless he can seize the interest reserved to the settlor, notwithstanding the clause against involuntary alienation, and that is the procedure he will observe when he wishes to reach the life interest, the settlor being still alive. Or, he may proceed upon the theory that

⁵ Gray, *Restraints on Alien.*, 2 ed. (1895), §268a. *Ghormley v. Smith*, 139 Pa. 584 (1891), same deed of trust in *Patrick v. Bingham*, 2 Super. Ct. 113 (1896); *Hay v. Price*, 32 Pa. C. C. 197 (1906), s. c. 15, D. R., 144 *semble*, stated §544, *post*; *Andress v. Lewis*, 17 W. N. C. 270 (1886), s. c., 1 Pa. C. C. 293; *Barber v. Snyder*, 17 Mont. Co. 195 (1901); *Lewis v. Miller*, 21 W. N. C. 94 (1888). In *Loyd v. McCaffrey*, 46 Pa. 410 (1864), an arrangement between the depositor, the bank, and a creditor of the depositor, that a certain check given by the depositor to his creditor should, on an attachment laid on the bank by the creditor of the depositor, be immediately passed to the credit of the creditor, payee of

the check, was held void as against the creditor. Consider in this connection those cases where the creditor of the cestui que trust cannot reach a trust fund because the cestui que trust himself is not yet in a position to receive payment of his interest under the trust; as in *Foster's Est.*, 179 Pa. 610 (1897); where the court put the case on the ground that the trust property (furniture) was, in its nature, indivisible. The real reason, it is believed, was that the time had not yet arrived for the termination of the trust. The interest of the cestui que trust here was an interest in remainder.

⁶ Gray, *Restraints on Alien.*, 2 ed. (1895), §§90-95.

the deed is void under the Statute of 13 Elizabeth, in which case the clause prohibiting involuntary alienation does not figure in the decision, and he can reach both principal and life estate even though there is a gift over the principal.⁷

Discretionary Powers in a Trustee

279. The cases where the trustee has discretion as to the payment to the cestui que trust, although sometimes considered under the heading of spendthrift trusts,⁸ come under a different principle. If the discretion is such that the trustee can make the payments so that they will amount to a restraint on the enjoyment by the cestui que trust, the cestui que trust can ask relief from a court of equity. These cases, therefore, come under the rule forbidding restraints on enjoyment, and will be discussed in Part IV.⁹ Under the same principle come the cases of trusts for support, maintenance, education, etc., of the cestui que trust. In a number of these cases the court seemed to think that there was exemption from involuntary alienation because of these discretionary words,—that there was a spendthrift trust. The words, however, might have the effect of inducing the trustee to make the payments in such a way as to amount to a restraint on the enjoyment by the cestui que trust, and we would then have the question as to how far he can proceed under the discretion against the wishes of the cestui que trust.¹⁰

Clause Against Anticipation Where There is a Clause Prohibiting Involuntary Alienation

280. The clause against anticipation is properly introduced only in the case of a married woman's trust,¹ and has no place whatever in a trust of any other kind. The effect of the clause

⁷ In *Mackason's App.*, 42 Pa. 330 (1862), the settlor was dead, and his creditors came in on the fund held by the trustees under the settlement as against the settlor's appointee. The clause prohibiting involuntary alienation applied only to the income, as to which no question was before the court. *Catherwood's Est.*, 29 W. N. C. 344 (1891), accord. In *Nolan v. Nolan*, 218 Pa. 135 (1907), there was no clause

prohibiting involuntary alienation, but the creditor was allowed to satisfy his claim out of the principal, even though the debt was contracted after the creation of the deed of trust.

⁸ See *Brubaker v. Huber*, 13 Pa. C. C. 78 (1893), s. c. 2 D. R. 703, 10 Lane. L. R. 99.

⁹ See Chap. 23 on discretion.

¹⁰ See Chap. 23.

¹ See §§596, 597, post.

is to prohibit voluntary alienation, and it can, therefore, have no weight whatever in considering whether the interest is exempt from involuntary alienation. If a clause prohibiting the voluntary alienation of an equitable life estate is void, and it is submitted that it is,² then the clause against anticipation is, in like manner, void. If such a clause is valid, then the same object can be obtained by an ordinary prohibition clause, and there is no occasion to resort to the clause against anticipation. It is the common practice, for reasons which are not very clear, to insert in trust settlements in Pennsylvania a clause against anticipation, without consideration of whether the case is that of a married woman's trust or not, and in most of these cases there are so many other clauses of prohibition and of forfeiture, that a case turning solely on the clause against anticipation is rather unlikely to arise.

Part of the Estate Covered by the Clause

281. Several cases have arisen presenting the question of construction as to what part of the estate is subject to the clause against alienation. In *Moore v. Deyo*³ the testator created spendthrift trusts for life, with remainders to charities. The gifts to the charities fell because the will was executed within thirty days of the testator's death, and it was held that the clause against alienation did not apply to the remainders, although they went by way of resulting trust to the cestuis que trustent of the life estates. In *Baeder's Estate*⁴ there was a trust as to the share of the son, by which the trustees were empowered to advance one-half of his share to the son upon his attaining the age of twenty-five years, and the other one-half was directed to be held in a spendthrift trust. The trustees decided not to pay the son his half. Held, that that part was covered by the spendthrift trust also. Where the trustee commits a devastavit, and his share in the estate is appropriated to make up the loss due a cestui que trust whose interest is subject to the clause against alienation, the money so appropriated is, in like manner, subject to the clause. It takes the place of the other fund and is embraced in the same limitations.⁵

² See §319, post.

³ 212 Pa. 102 (1905).

⁴ 190 Pa. 614 (1899). See this case discussed as to discretion §536, post.

⁵ *Seitzinger's Est.*, Illig's App., 170 Pa. 500 (1895). See also *Phillips's Est.*, 1 D. R. 311 (1892), s. c. 11 Pa. C. C. 500, 30 W. N. C. 241.

Effect of the Clause Prohibiting Involuntary Alienation

282. The character of the obligation incurred by the cestui que trust is immaterial. If the interest is protected from involuntary alienation generally, the point covered is the alienation, and that necessarily includes any process, and it is of no moment for what the process is issued.⁶ It is to be observed, however, that no case has arisen presenting the question of how far the prohibition protects from proceedings in eminent domain. To be logical and consistent the court should reach such conclusion and allow the exemption. It would be hazardous to venture any proposition as to the conclusion that will be reached. There is one case turning on the character of the obligation incurred, which requires attention.

Decker v. Directors of the Poor

283. In *Decker v. Directors of the Poor*⁷ the income of the cestui que trust was held liable to proceedings under §29 of the Act of June 13, 1836,⁸ for the maintenance of his wife and family. The terms of the will are not clearly given in the report of the case, so that it is difficult to understand the decision. It seems as if the cestui que trust had the right to terminate the trust at his pleasure. It was intimated by the court below that the claim was not strictly a debt, as the term was used in the will, and also that there was no expression in

⁶ The clause was sustained as against an attachment to enforce a decree for alimony: *Thackara v. Mintzer*, 100 Pa. 151 (1882). As against complaint by the Guardians of the Poor for the support of the wife in the above case: *Guardians of the Poor v. Mintzer*, 16 Phila. 449 (1883), s. c. 40 L. I. 37. Where, however, there are other words in the will indicating that the income is to be used for the maintenance of the wife of the cestui que trust, an order for the support of the wife will be made: *Board of Charities v. Moore*, 6 Pa. C. C. 66 (1888), s. c. 19 Phila. 540, 45 L. I. 216, 5 Lanc. L. R. 229. As against execution issued at the instance of the Board of Charities and Correction under the desertion act for the maintenance

of the wife and children of the cestui que trust: *Board of Charities v. Lockard* 198 Pa. 572 (1901). As against claim at audit of account: *Mannerback's Est.*, 133 Pa. 342 (1890). Attachment against the trustee: *Winthrop Co. v. Clinton*, 196 Pa. 472 (1900). Where one cestui que trust was trustee, the clause prevented a surcharge on his share in the estate for loss occasioned by his mismanagement: *Overman's App.*, 88 Pa. 276 (1878, 1879); *Dunglison's Est.*, 201 Pa. 592 (1902). Attachment sur judgment in an action of tort: *Wright's Est.*, 28 Pa. C. C. 540 (1903); dictum, *Mercur, J.*, in *Thackara v. Mintzer*, 100 Pa. 151 (1882).

⁷ 120 Pa. 272 (1888).

⁸ P. L. 539.

the will which referred to future debts, and further, that the claim at bar was incurred after the death of the testator who created the trust. The case is distinguished on the ground of the special provisions of the will by Mr. Justice Potter, in the case of *Board of Charities v. Lockard*.⁹ It may therefore be considered as being in entire conformity with the current of authority above noted.

Claim Does Not Protect the Estate in the Hands of the Cestui Que Trust

284. All these proceedings were against the trustee attempting to reach the sum in his hands due the beneficiary. It may not seem unnecessary, however, to point out, as was done by Mr. Justice Mercur,¹⁰ that where the proceedings are against the beneficiary to collect the debt out of money in his hands, a different question is presented, as for instance, an attachment of bank account in which the cestui que trust has deposited the money received from the trustee. That the creditor could succeed in such case is beyond dispute.

As to the Extent of the Protection as to Previously Incurred Obligations

285. Will words exempting the interest from debts which the cestui que trust may contract, protect from involuntary alienation for obligations incurred before the date of the settlement? The law is not clear. In *Mehaffey's Estate*¹¹ the words of the trust as to which the controversy arose were: "without any liability for any debts, contracts or engagements which they may make." The cestui que trust gave an order on the trustee to pay a certain sum to a creditor for a debt contracted before the death of the testator. The court below said that the force of the words "may make" was to exempt the interest only from debts contracted after the death of the testator. Therefore, the order was valid, as it operated as an assignment, and the creditor was entitled to recover from the trustee the amount of the order. On appeal, the Supreme Court reversed, saying that although this might be a proper

⁹ 198 Pa. 572 at 574 (1901).

at 155 (1882).

¹⁰ In *Thackara v. Mintzer*, 100 Pa. 151

¹¹ 189 Pa. 276 (1890).

construction of the trust, yet as the right of the creditor was founded on the order, to the making of which order the cestui que trust was incapacitated, the creditor could not recover, the order being made after the death of the testator.¹ No statement as to the law can be made in view of the authorities. It is submitted that it is open to the Supreme Court to decide that words of future exemption do not protect from obligations incurred before the interest vests, and that such a decision would be in conformity with the policy of strictly construing the clause prohibiting involuntary alienation.

As to Effect of Clause Against Involuntary Alienation on Assets Appointed by Life Tenant Under a General Power

286. Since a power of appointment does not enlarge a life estate to a fee, and the donee under the power is considered as taking under the original instrument,² it follows that the creditors of the donee can have no claim at law against the assets appointed under the power. The donee of a general power may, of course, appoint to his creditors.³ In some jurisdictions the creditors of the donee may in equity come in on the assets notwithstanding an appointment to some one else. This result is reached on the principle that as the donee has practically all the powers of an owner in fee, the chancellor will compel him, if he exercises the power at all, to first appoint, to his creditors, and as equity will consider that as done which ought to be done, the creditors will be allowed to come in in all cases of appointment. The law in Pennsylvania has been understood to be that the creditors have no claim on the

¹ See also remarks of the court below in *Decker v. Directors of the Poor*, 120 Pa. 272 at 274 (1888). See §283, ante, to the same effect. This difficulty arises from the unscientific form of the prohibition which has been generally adopted. The point is involuntary alienation. The obligation incurred cannot affect the interest of the cestui que trust until it has been reduced to judgment and execution issued. The common notion seems to be that the interest is free from debts, obligations, etc., and the clause is worded accordingly. If the nature of the debt is immaterial, why is not

the time when it was incurred immaterial?

² *Bell's Est.*, 15 Phila. 589 (1882), s. c. 39 L. I. 430. See §389, post, on the application of the rule against perpetuities to powers of appointment.

³ As to what constitutes such an appointment, see *Stokes's Est.*, 3 Pa. C. C. 193 (1887), s. c. 18 Phila. 175; *Horner's Est.*, 4 Pa. C. C. 189 (1887), s. c. 3 Montg. Co. 155 (sub. nom. *Spencer's Account*), 3 Del. Co. 341; *Fell's Est.*, 14 D. R. 327 (1905); *Kensel's Est.*, 21 Montg. Co., 67 (1905); *Fisher's Est.*, 16 D. R. 151 (1907).

assets, although no case has been found deciding the point.⁴ In a number of cases where there was a clause against involuntary alienation, it was held that the creditors of the life tenant could not come in on the assets appointed under a general power.⁵ If it is the law that the creditors cannot come in anyhow, then the clause against involuntary alienation is a superfluity. If they can, the clause under the cases cited prevents the creditors' claims from attaching. In any event, no matter which view is adopted, it may be said to be the settled law that the clause against involuntary alienation prevents the creditors of the life tenant from coming in on the assets appointed under a general power. It is submitted, however, that these cases are unsound; that the clause only applies to the life estate, that it is a severe stretch to extend it to the principal, and that such extension is practically the same as saying that the clause is valid when attached to an absolute interest.

As to Accumulated Income Due the Cestui Que Trust at the Time of His Death

287. Where the cestui que trust dies and there is income accumulated in the hands of the trustee which has not been paid over, does the clause against involuntary alienation prevent the trustee from paying those accumulations to the personal representatives of the deceased cestui que trust? It was said in two early cases that the personal representatives of a cestui que trust, upon whose interest the restraint against alienation has been imposed, could not recover from the hands of the trustee, the accumulated income which the cestui que trust would have received, if living. To permit them to receive the income, it was said, would subject it to the claims of the cestui que trust's creditors.⁶ In a recent case the court reached a differ-

⁴ The cases are not clear, and the point appears to be open on the authorities: *Morris v. Phaler*, 1 Watts, 389 (1833), dictum Gibson, C. J., at 391; dictum Gibson, C. J., in *Commonwealth v. Duffield*, 12 Pa. 277 at 279 (1849); see argument of the late Mr. McMurtrie in *Swaby's App.*, 14 W. N. C. 553 (1884).

⁵ *Swaby's App.*, 14 W. N. C. 553 (1884). Point not decided in *Mackason's App.*, 42 Pa. 330 (1862), although

so argued in *Ghormley v. Smith*, 139 Pa. 584 (1891). *Dunglison's Est.*, 201 Pa. 592 (1902). As to *Fleming's Est.*, 219 Pa. 422 (1908), see §241, ante.

⁶ *Horwitz v. Norris*, 49 Pa. 213 (1865); *Huber's App.*, 80 Pa. 348 (1876). "The income was committed to the disposal of the trustees, to be applied to his maintenance, support and benefit, and they were to exclude his creditors. * * * He owned nothing which he could dis-

ent conclusion, although the point was not argued.⁷ The latter view seems to be the better. If the income is paid to the cestui que trust in his lifetime, it becomes subject to the claims of his creditors in his own hands. Why, then, should there be any difference when the income is paid to his personal representatives after his decease? The fact that, in one case, the creditors are not likely to get anything, and that in the other, the executors cannot get away with the assets, being under the necessity of filing an account, has no logical bearing on the principle involved. Furthermore, to permit the trustees to retain the income, involves to that extent an accumulation of income which is directly within the provisions of the Act of April 18, 1853.⁸ This does not seem to have been called to the attention of the court in the earlier cases. Furthermore, to whom is the accumulated income to be paid? The trust makes no provision for this addition to principal, and the court would have difficulty in ascertaining who should receive the amount. The question seems to be open on the cases, as there was no argument of the point in *Seitzinger's Estate*.⁹

Accrued Income

288. The cases do not touch the question of accrued income. There should, however, be no distinction on principle between accrued income and accumulated income.¹⁰

Effect of the Clause as Between Trustee and Cestui Que Trust

289. It is the duty of the trustee to see that the terms of the trust are observed, and since the clause is imposed for the benefit of the cestui que trust, it follows that the trustee is responsible, if he permits the cestui que trust to circumvent the clause. The trustee cannot, when there is a clause against

pose of by will, as owner. And as he had no power apart from ownership, over income, it is impossible to see how that not received, whether due and payable, or only accruing at his death, can go either to his executors or the trustees appointed by him in his attempt to execute the power." Strong, J., in *Horwitz v. Norris*, 49 Pa. 213 at 222, (1865).

⁷ *Seitzinger's Est.*, 170 Pa. 500 (1895). The question was discussed from another point of view. There the

income due the cestui que trust had been wrongfully withheld by the trustee, and it was decided that the part so withheld could be paid to her personal representatives. Point not noticed in the syllabus. See *Walters's Est.*, 223 Pa. 598 (1909) accord.

⁸ The statute against accumulations, for discussion of which see Chap. 25.

⁹ 170 Pa. 500 (1895).

¹⁰ See remarks of Strong, J., §287, n. 6, ante.

involuntary alienation, seek refuge in the connivance of the cestui que trust when the terms of the trust have been violated. No cases have been found in Pennsylvania raising this point. In two cases¹ there are dicta lending countenance to the view that the acquiescence of the cestui que trust will relieve the trustee from liability. While this principle carried out might furnish a means of ridding the state almost entirely of the doctrine of spendthrift trusts, it is submitted that it is inconsistent with the entire theory of equity which obtains when a cestui que trust is under disability, whether natural or imposed by the terms of the trust.²

Mr. Gray's Explanation of the Origin of Spendthrift Trusts

291. Spendthrift trusts appear to have made their first appearance in the state of Pennsylvania, and it is a matter of some interest to ascertain, if possible, the exact origin of this extraordinary doctrine. Mr. Gray³ gives the following account of the origin of these trusts. As there were formerly no courts of equity in Pennsylvania there was no way to enforce equitable rights, and in order to give such a remedy, many equitable rights were turned into legal rights. This was done in two ways, (1) by extending the operation of the statute of uses to a use of personal property,⁴ (2) by considering as executed trusts which elsewhere would be considered as active and without the statute of uses.⁵ That equitable rights in land could be taken on execution by legal process, but when spendthrift trusts made their appearance, the court hesitated to permit the taking of the complicated interests of the cestui que trust under a legal process, and when equity jurisdiction was finally established the hold of spendthrift trusts was too strong to be shaken off. This explanation of the learned author, however, it is submitted, begs the question. Why should the court hesitate to extend the execution to the case of a spendthrift trust any more than to the case of an ordinary trust, and that executions are permitted as to ordinary trusts is beyond dispute. This

¹ *Clemens' Est.*, 175 Pa. 110 (1896), stated §317, post, and *Jones's Est.*, 199 Pa. 143 (1901), stated §318, post.

² See §597, post, as to acquiescence of trustee in the violation of the clause against anticipation.

³ *Restraints on Alien.*, 2 ed. (1895), §214, et seq.

⁴ This statement is open to question. See §123, ante.

⁵ See this point discussed, §§132, 133, ante.

explanation would relieve all equitable interests from liability for execution for debts.

Dictum in Fisher v. Taylor

292. It is submitted that spendthrift trusts had their origin in a dictum of the court in the case of *Fisher v. Taylor*.⁶ There was a gift in trust for a son for life, without liability for debts, with remainder over to his heirs, etc. The equitable interest of the son was taken in execution by the sheriff, and sold under a legal execution. The purchaser at the sheriff's sale brought an action of ejectment against the trustees, in which he could not succeed anyhow, as he acquired no greater right than his debtor had. The debtor had no right to the legal title in any event, as he had only an equitable title and the trust was active. The language of the court is not very clear, and there is some doubt as to the real thought that was in the mind of the learned judge who wrote the opinion. In the latter part of his opinion he seems to go on the ground that the plaintiff bought an equitable title. In the first part of his opinion he adopts the argument of the learned counsel for the defendant in error, that a man has a right to dispose of his property as he pleases, and consequently, to make a provision for his son, which could not be taken away from him for the payment of any debts which he might contract, and that there was no law which forbade such a disposition of the parent's estate. The attention of the court was not called to the fact that there was a positive rule of law forbidding such a disposition, to wit, the acts making all property liable for debts. The remarks of the court, therefore, in this case may be regarded as ill-considered dicta. There are a number of cases⁷ where property was given in trust to the trustee to hold, manage, and use for the benefit of his family or children, he to have no interest therein excepting only an allowance for services to be rendered. It is, of course, obvious that no creditor of the trustee could seize his interest in the

⁶ 2 Rawle, 33 (1829).

⁷ *Ashhurst v. Given*, 5 W. & S. 323 (1843); *Holdship v. Patterson*, 7 Watts, 547 (1838); *Brown v. Williamson*, 36 Pa. 338 (1860); *Rees v. Livingston*, 41 Pa. 113 (1861); *Heazleton's Est.*,

2 W. N. C. 204 (1874); *DeRoy v. Richards*, 8 Super. Ct. 119 (1898); *Gillespie v. Miller*, 37 Pa. 247 (1860). The chief controversy in these cases was between the creditors and the cestui que trust of the trust estate. It is

trust estate. Any provision in the trust exempting the interest from alienation would be superfluous, in so far as the creditor of the trustee was concerned. The allowance for services would only be a compensation to the trustee, and would not subject the trust estate to his creditors. These cases are frequently cited as spendthrift trusts, and are really not in point.

Vaux v. Parke

293. In *Vaux v. Parke*⁸ there was no clause against involuntary alienation, but the trustee had discretion as to transferring the real estate comprised in the trust to the cestui que trust. The interest of the cestui que trust was taken in execution and sold, and the purchaser brought ejectment against one of the other children apparently in possession who was entitled to a one-third interest therein. The plaintiff, of course, could not succeed in his action, and his only remedy, if he had any, would be in an action of partition, and in no event could he secure the legal title under the sale at the execution. The remarks of the court as to the clause against alienation were, therefore, dicta.

Author's Conclusion as to Origin of Spendthrift Trusts in Pennsylvania

294. The conclusion, therefore, is that the doctrine of spendthrift trusts in Pennsylvania originated in the ill-considered dictum of Smith, J., in *Fisher v. Taylor*,⁹ and was adopted by the judges in a number of subsequent cases, where also, the remarks were unnecessary to the decision of the case, and that subsequently, when a case arose presenting the point for decision, the Supreme Court seemed to feel itself bound by these dicta, and the doctrine was thus introduced into the law of Pennsylvania.¹ Such dicta, perhaps, were to be expected in

perfectly clear that the creditors of the trustee, on his own individual indebtedness, could not, in any event, take in execution the assets of the trust estate. Where, however, the debt was contracted for the purposes of the trust, the result would be different, as where the debts were contracted in carrying on the business. *Stevenson v. Matthews*, 9 Pa. 316 (1848), s. c. 6 Pa. 496 (1847). No case has been found where there

was a clause against involuntary alienation applicable to such debts, and the validity of the clause in such a case would be extremely doubtful.

⁸ 7 W. & S. 19 (1844).

⁹ 2 Rawle, 33 (1829).

¹ For a discussion of the part which the notion as to the operation of the statute of uses entertained by the Supreme Court played in the development of this doctrine, see §131, ante.

a state where the development of equitable doctrines was so long in a backward condition.² It was many years before the Supreme Court reached a definite and clear notion of the nature of a trust and the principles pertaining thereto. The judges at the time the early cases were decided felt that the trustee's title could not be taken away by the cestui que trust's creditors. But they did not know exactly how to justify the result, which they could have easily done had the distinction between law and equity been made clear to their minds.

² For an excellent statement of the doctrine of spendthrift trusts, see Gray, *probable cause of the spread of the Restraints on Alien.*, 2 ed. (1895), preface.

CHAPTER 14

EQUITABLE LIFE ESTATES. VOLUNTARY ALIENATION

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Forfeiture for Voluntary Alienation of an Equitable Life Estate

311. A clause of forfeiture for the voluntary alienation of a legal life estate, is valid.¹ There is no reason for any distinction in the case of an equitable life estate. No Pennsylvania case on the point has been found, and the clause is probably valid when attached to a gift of an equitable life estate.

Preliminary Discussion of Prohibition of Voluntary Alienation of an Equitable Life Estate

312. A prohibition of the voluntary alienation of a legal life estate is void at common law,² and is probably void in Pennsylvania.³ Equity should follow the law, and the clause

¹ See §225, ante.

³ See §228, ante.

² See §226, ante.

be of like invalidity in the case of an equitable life estate, unless there is some reason to the contrary. There are several cases of importance in this connection, and it may be observed, before proceeding to discuss them, that as a power to will is not an incident of a life estate, a restraint on testamentary power attached to an equitable life estate is a superfluity.⁴

Shankland's Appeal

313. In *Shankland's Appeal*⁵ the property was devised in trust to pay the income for life, without being subject to debts or liabilities. The cestui que trust undertook to sell his life estate, and it was held on a bill in equity for specific performance that he did not have a good title. The language of the court seems to indicate that the real ground of the decision was that the parties intended that the legal title was to be transferred. The form of the contract as given in the report leaves the matter in some doubt,⁶ and unless the case can be thus explained, it is difficult to sustain the decision as there was no prohibition of voluntary alienation.

Rife v. Geyer

314. In *Rife v. Geyer*⁷ the testator devised one-eighth part of his estate in trust, "to let and demise the real estate * * and recover and receive the rents and income thereof, and pay over the same when received into the hands of S. or such other person or persons as he may authorize, * * or at his option to permit and suffer him, the said S., to let, demise, occupy and enjoy * * and receive and take the income thereof, during all the term of his natural life, for his own separate use, and so the same shall not be in the power, or liable to the debts, control or engagements of the said S." And from and immediately after the decease of Stephen, then to hold the estate in trust for the heirs and legal representatives of Stephen. Partition was made under the will of the decedent, and a certain piece of real estate was allotted to the trustee under the trust for Stephen. The trustee then conveyed the premises to the son in fee. The son then conveyed

⁴ See *Levy's Est.*, 153 Pa. 174 (1893).

⁵ 47 Pa. 113 (1864).

⁶ See language of Read, J., at p. 114;

see Gray, *Restraints on Alien.*, 2 ed. (1895), §229, for observations on this case.

⁷ 59 Pa. 393 (1868).

to the defendant who gave a mortgage in part payment. Suit was brought on the mortgage given to the son, and, on a case stated for the consideration of the court, it was held that the deed to the son was of no effect; that therefore he had no title, and could not recover on the mortgage. The son had an equitable life estate. The conveyance to him by the trustee was a breach of trust, and the purchaser, of course, would get a bad title from the son upon which he could defend in the suit on the mortgage. The court said that the life estate was equitable, as the statute of uses did not apply because of the clause exempting from liability for debts, but took no notice of the word control. The case is therefore of doubtful authority for the validity of the clause, as the estate was equitable on other grounds, and in that event the disposition of the legal title by the cestui que trust was void anyhow.⁸

Philadelphia Trust Co. v. Guillou

315. In *Philadelphia Trust Co. v. Guillou*⁹ there was a gift to trustees in trust to let and manage the real estate, collect the rents "or allow my said son, W. J. F. (the cestui que trust), at his option to use and occupy any lands," etc., belonging to the estate, and to invest the personal estate and pay over the income from the real and personal estates to the cestui que trust for life, "and in no event shall the principal or income thereof be liable in any way or manner whatsoever for any of the debts, liabilities or engagements of my said son or to any attachment or execution or proceeding in the nature thereof." It appeared that before his death the testator rented certain of his properties to a firm, and that after the testator's death, the cestui que trust, who was also one of the trustees under the will, collected two months' rent. He was then discharged as trustee and made an assignment for the benefit of creditors. The case arose on a controversy between his assignee and the substituted trustee for the next month's rent of the premises, and it was contended, that as he had collected the rent, he had exercised his option to use, occupy and enjoy, and had therefore a legal title to the rents which passed to his assignee. Judgment for the assignee in the court below was, on appeal,

⁸ Contrast this case with *Keyser's* ante, as to application of the statute App., 57 Pa. 236 (1868), stated of uses.
⁹ 246, ante. See §§131, n. 6, 133, n. 3, ⁹ 100 Pa. 254 (1882).

reversed. Mr. Chief Justice Sharswood said that it was immaterial how the cestui que trust had collected the rent; the trustees could intervene at any time they saw fit and collect any future rent. This case, therefore, can hardly be considered an authority against the right of the cestui que trust to assign, as in any event the trustee, as custodian of the legal title, would have been entitled to the rents, and the assignment would only give the assignee the right to receive the income from the trustee, and not to collect the rent of the property of the trust estate. The clause was against involuntary alienation only, and while it was perhaps necessary for the trustee to have power to collect the rents in order to defeat the claim of creditors, it did not follow that the cestui que trust could not make an assignment of his equitable interest. The assignee meddled in that which was none of his business.

Mehaffey's Estate

316. In *Mehaffey's Estate*,¹⁰ where, under the terms of the trust, there being a clause against involuntary alienation with a proviso as to part that the income should not be "in the power of the cestui que trust," there was an alternative provision to pay the interest to such person or persons as the cestui que trust should authorize to receive the same, the court said that the clause did not permit the cestui que trust to give an order on the trustee to pay the sum out of the income to his creditor. The remarks of the court were dicta, as (1) the trustee did not have any funds with which to pay the order, (2) the cestui que trust had notified the trustee not to recognize any order which he might sign.¹

Clemens's Estate

317. In *Clemens's Estate*² the trustee invested a portion of the trust funds in a mortgage on real estate owned by the cestui que trust. By an arrangement between the trustee and the cestui que trust, the interest due on the mortgage was paid by debits in the trust income accounts. The cestui que trust made an assignment for the benefit of creditors, which assignment included the real estate in question, and the assignee subsequently sold the property subject to this mortgage. The

¹⁰ 139 Pa. 276 (1890).

(1903).

¹ See *Wright's Est.*, 28 Pa. C. C. 540

² 175 Pa. 110 (1896).

trustee then made a claim against the assignee under the assignment for the interest due on the mortgage between the date of the assignment and the sale by the assignee.³ It was held that there could be no recovery, and the claim was disallowed. The interest was paid by the items in the account, and the trustee could not collect the same sum over again in cash. The question presented is, whether the cestui que trust can, by a bookkeeping arrangement with the trustee, divert a portion of the income of the trust estate to the payment of a debt due to her assignee. If she can, the case is the same as if she were allowed to voluntarily assign that much of the income to the assignee to be used by him for the benefit of her creditors. As the terms of the will are not given, the case is utterly valueless as a precedent on the question under discussion, which is to be regretted, since much depends in these cases on the exact wording of the clause against alienation. It cannot be ascertained, therefore, whether the clause was against voluntary alienation or involuntary alienation or either. It further appears that the trustee, when the property was sold, gave a certificate that nothing was due on the mortgage in the way of interest, and on that ground the case can be supported as to the interest unpaid to that time, even if there was a prohibition of voluntary alienation, as the trustee could not claim against its own certificate. But the fact that it had given such a certificate would not avail it in a claim by the cestui que trust for the income due and unpaid.

Jones's Estate

318. In Jones's Estate⁴ the clause was, "The principal or interest of said trust fund, whilst in the hands of the trustee, shall not be taken or used or in any way become liable for the debts," etc. There were two questions raised in the case as to the payment of income to the cestui que trust: (1) receipts were prepared in advance in blank and signed by the cestui que trust. His wife then took the receipts to the trustee, who gave her a check, sometimes to her order, sometimes to the order of the husband, for the amount which was found to be due. The trustee asked credit for these amounts, which credit

³ It appears that the interest before the assignment had been in like manner credited in the income account. No

question was raised as to these payments.

⁴ 199 Pa. 143 (1901).

was sustained. This seems to be an unobjectionable method of paying income to the cestui que trust. (2) The cestui que trust had been sent to jail for failure to pay alimony to his wife. He then made an arrangement with her through counsel by which he was to give her a certain portion of the income from the trust estate and pay her counsel fee. This was accomplished by the subterfuge of the cestui que trust specially endorsing in advance to the wife certain checks drawn by the trustee for income, which checks were then delivered by the trustee to the wife. It did not appear whether the counsel fee was paid by a check endorsed to them or by a check to the wife who paid it herself subsequently. A credit for these items was upheld by the court as against the objection of the cestui que trust. If this arrangement was anything, it was a payment in pursuance of a voluntary equitable assignment. It is difficult to discover any prohibition upon voluntary alienation in the terms of the will, although Brown, J., in delivering the opinion of the Supreme Court,⁵ said that a spendthrift trust was clearly created.⁶

*Summary of the Pennsylvania Cases and Statement of the Law
as to the Validity of a Prohibition of the Voluntary
Alienation of an Equitable Life Estate*

319. No very clear conclusion as to the law can be drawn from these cases. The notion seems to run through the minds of most of the judges that a so-called spendthrift trust is of itself inalienable. This conception, perhaps, springs from the ambiguous nature of the term spendthrift, and overlooks not only the very clear distinction between voluntary and involuntary alienation but also the circumstance that a prohibition of one form of alienation does not prohibit the other.⁷ This notion clearly appears in *Shankland's Appeal*,⁸ where there was no prohibition of voluntary alienation. This case is doubtful, and may be explained on the ground that the parties intended to dispose of the legal title. *Rife v. Geyer*⁹ and *Philadelphia Trust Co. v. Guillou*¹⁰ may also be

⁵ At p. 144.

⁶ It might have been argued that the word "use" made it incumbent on the trustee to see that the income was not paid to a creditor, either in pursuance of a voluntary or involuntary assign-

ment. See, however, §270, n. 10, ante.

⁷ See §173, ante.

⁸ 47 Pa. 113 (1864), stated §313, ante.

⁹ 59 Pa. 393 (1868), stated §314, ante.

¹⁰ 100 Pa. 254 (1882), stated §315, ante.

explained on the ground that the controversy was over the legal title. It is beyond the power of the cestui que trust in any kind of a trust to deal with the legal title. The remarks in *Mehaffey's Estate*¹ were dicta. The facts in *Clemens's Estate*² are so meagrely given that the case is utterly valueless as a precedent. *Jones's Estate*³ clearly recognizes the right of the cestui que trust to make a voluntary alienation, although the clause against voluntary alienation is difficult to discover. It therefore appears that there is no case which decides squarely that the clause of prohibition against voluntary alienation is valid; that the notion that there can be no voluntary alienation in the case of a so-called spendthrift trust is a fallacy, and that all the cases in which the question is directly or indirectly involved can be explained on other grounds. No statement as to the law can be ventured, but in this condition of the authorities it may perhaps be said that on principle the clause is void, and there is no clear decision to the contrary in Pennsylvania.

Trusts for Support and Maintenance

320. It has been said that a trust for the personal support, comfort and maintenance of the cestui que trust cannot be alienated. This notion may be traced to the case of *Lancaster v. Dolan*.⁴ It is submitted that such directions in a trust, if they have any effect at all, are a restraint on the use and enjoyment by the cestui que trust of his equitable life estate and have no effect on the alienability of the interest.⁵ The cestui que trust may alienate in the absence of any valid clause to the contrary,⁶ and the trustee, if the directions in the trust are valid, may use the income for the support and maintenance of the new cestui que trust. While this is probably the proper principle, it has not been recognized by the Supreme Court of Pennsylvania.

¹ 139 Pa. 276 (1890), stated §316, ante.

² 175 Pa. 110 (1896), stated §317, ante.

³ 199 Pa. 143 (1901), stated §318, ante.

⁴ 1 Rawle, 231 (1829). See argument of Mr. Ingersoll on p. 239 and language

of Gibson, C. J., on p. 247. See this case stated §590, post.

⁵ See §545, post, as to this point.

⁶ See §162, ante.

PART III

THE RULE AGAINST PERPETUITIES

- Chap. 15. The Rule Against Perpetuities.
- Chap. 16. Interests Subject to the Rule.
- Chap. 17. Powers and the Rule Against Perpetuities.
- Chap. 18. Gifts to a Class and the Rule Against Perpetuities.
- Chap. 19. Where the Interests Violate the Rule.

CHAPTER 15

THE RULE AGAINST PERPETUITIES

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Preliminary Discussion

325. The power to create future estates has already been noticed.¹ The estates or interests, legal and equitable, in realty and personalty, which may be created under that power have been discussed and classified.² At the risk of some repetition, it may be observed at this point that this power was originally conceived of as a power to divide the absolute ownership, and at that time the notion of a future interest had not been introduced into the law.³ The fundamental conception has changed. The obstacles to the division of the fee or absolute ownership, which obstacles were probably more metaphysical than feudal,⁴ have practically disappeared,⁵ and in modern times the power to create future estates is easily conceived of. The principle of public policy which demands⁶ the restraint on this power expresses itself in the rule against perpetuities—perhaps more accurately designated as the rule forbidding the creation of a perpetuity. It is to this part of the subject that our attention will now be directed. The law relating to the rule against perpetuities in Pennsylvania is, with very few exceptions, plain and well settled. The student will have no difficulty in mastering this part of the subject aside from that arising from the subtlety of the subject itself, and the practitioner can advise his clients with a confidence which is in refreshing contrast to the doubts he feels when advising them on the law treated in many other parts of this book.⁷

¹ See §5, ante.

² See Chap. 3 as to future legal interests in real property, Chap. 4 as to future legal interests in personal property, and Chap. 7 as to trusts.

³ See §36, et seq., ante.

⁴ See §39, ante.

⁵ See §§115, 116, ante.

⁶ See §§11-14, ante.

⁷ The learned reader will remark at the small number of cases which have arisen on the rule against perpetuities, in contrast with the abundant crop of litigation noted under Part II. The difference is

Historical Evolution of the Rule

326. The rule against perpetuities first took its shape in the discussion of cases arising on executory devises of chattels real,⁸ and was first suggested at bar in 1616.⁹ It seems that the validity of contingent interests depended at first on the nature of the contingency upon which they were limited to take effect,¹⁰ and that no question of remoteness of a limitation of a freehold estate arose until 1664.¹ Lord Nottingham, in the Duke of Norfolk's case, in 1681,² established the points (1) that the validity (invalidity) of the future interest depended on its remoteness, and not on the nature of the contingency, (2) that the contingency must occur within a life or lives in being.³ The limits within which the contingency must occur were subsequently extended (1) to cover the time necessary for the birth of a posthumous child;⁴ (2) twenty-one years were then added to provide for the minority of the children in esse at the expiration of the life estate; (3) the consideration of minority was lost sight of, and the period of twenty-one years was allowed in gross without reference to an existing minority.⁵

The Rule Against Perpetuities is a Common Law Rule

327. The rule against perpetuities, therefore, has been developed entirely at common law, and is not the result of nor has it been affected by any statute⁶ except with respect to directions to accumulate income.⁷ The rule was brought

significant. Had the Supreme Court adhered to the common law with the same firmness with regard to the rule forbidding restraints on alienation as they have with respect to the rule against perpetuities, they would have relieved themselves of much extra labor, and have saved the people of the commonwealth from a heavy toll in litigation.

⁸ Gray, Rule Perp., 2 ed. (1906), §§148-160.

⁹ Gray, Rule Perp., 2 ed. (1906), §154.

¹⁰ Gray, Rule Perp., 2 ed. (1906), §168.

¹ Gray, Rule Perp., 2 ed. (1906), §139. See §§158-168, ante.

² 3 Chanc. Cases, 1; Gray, Rule Perp., 2 ed. (1906), §169.

³ Gray, Rule Perp., 2 ed. (1906), §170.

⁴ Gray, Rule Perp., 2 ed. (1906), §§171-175.

⁵ Gray, Rule Perp., 2 ed. (1906), §§176-185, §§186-188, §§223-224. Lewis, Perp., (1843) p. 168. For a good short statement of the history of the rule, see Gray, ubi supra, §§296-298.

⁶ It was erroneously referred to, however, as the statute against perpetuities by the reporter in Weinbrenner's Est., 173 Pa. 440 at 441, (1896) and in a per curiam opinion in Smith's Est., 181 Pa. 109 at 117 (1897).

⁷ See Chap. 25 on Accumulations and remarks of Clark, J., in Lawrence's Est., 136 Pa. 354 at 363 (1890). The Act of 1855 referred to by the learned judge does not touch the rule against perpetuities.

to America as part of the common law then in force and is imbedded in the common law of Pennsylvania.⁸

Mr. Gray's Statement of the Rule Against Perpetuities

328. The rule against perpetuities, as finally defined by Mr. Gray,⁹ is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." It is submitted, with diffidence, however, that this is not the rule against perpetuities at all. The rule destroys interests limited upon contingencies which may occur after a certain period. The interests which the rule does not destroy are the interests which, so far as the rule is concerned, are good. Mr. Gray's statement simply describes the class of future interests to which the rule does not apply. It is, therefore, respectfully submitted that it is not a statement of the rule itself.¹⁰

The Author's Statement of the Rule Against Perpetuities

329. The following statement of the rule is suggested: all future interests which are limited to an unascertained person, or to take effect upon a contingency other than the regular termination¹ of the preceding particular estate, are void whenever such person may possibly not be ascertained before, or the contingency may happen after, (1) the expiration of a life or lives in being at the creation of the interest and twenty-

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §§200, 200a. The earliest reference to the rule which has been found in a Pennsylvania case is by McKean, C. J., in *Ruston v. Ruston*, 2 Dall. 243 at 244 (1796).

⁹ Gray, *Rule Perp.* 2 ed. (1906) §201.

¹⁰ The relation which Mr. Gray's statement bears to the rule may be illustrated as follows: suppose an act were passed, making it unlawful to enter a dwelling-house after eleven o'clock at night without the consent of the owner. If there were no further law on the subject, an entry in the daytime without the consent of the owner would be lawful. The law punishes an entry made after eleven o'clock. It is, however, a statement only of the practical result of the law to

say, that no entry in a dwelling-house, without the consent of the owner, is lawful unless made before eleven o'clock at night. Furthermore, Mr. Gray's statement is ambiguous in so far as the term of twenty-one years is concerned, as it does not seem to provide for the case where the term is allowed without being preceded by a life in being, as to which see §340, post. See criticism of Mr. Gray's statement by Mr. Kales, 20 *Harv. Law Rev.*, 198 (1907).

¹ And an estate in fee simple absolute never determines, and a determinable fee may be said to terminate in a regular manner. See §27, ante, as to determinable fee.

one years and possibly nine months thereafter, or (2) the expiration of twenty-one years after the creation of the interest.² The learned reader may choose which statement of the rule he will bear in mind. It is immaterial, in so far as the practical operation of the rule is concerned, which one is selected. It is believed, however, that the form suggested is clearer and more easily understood.

Meaning of Perpetuity

330. Mr. Lewis points out³ that while legal lexicography supplies few words less susceptible of full and adequate definition, few have been the subject of more frequent and varied attempts at description. The term was ambiguous while the rule was developing, and it was not until recent times that anything like an accurate definition became possible. A number of definitions by eminent judges and text writers have been collected in the note in chronological order.⁴ It will appear

² This is very much the language in which Mr. Gray referred to the rule, *Gray, Restraints on Alien.*, 2 ed., (1895), §272, where he said "The rule against perpetuities declares that every estate or interest which requires the happening of a contingency or the arrival of a time certain as a condition precedent, is bad unless the contingency must happen or the time must arrive within a life or lives in being and twenty-one years."

³ *Lewis, Perp.* (1843), Chap. 12, p. 163. Mr. Challis, *Real Prop.*, 2 ed. (1892), p. 168, says that it is unnecessary to expend any labor in an attempt to define a perpetuity—that the rule is easily intelligible without any such definition. This is perhaps true, but unless the word perpetuity is accurately defined, it is difficult to distinguish this rule from the rule forbidding restraints on alienation. Mr. Challis's attention does not seem to have been directed to this point.

⁴ Lord Chancellor Nottingham, in 1681: "A perpetuity is the settlement of an estate or an interest in tail with such remainders expectant upon it as are in no sort in the power of the tenant in tail

in possession, to dock by any recovery or assignment. But such remainders must continue as perpetual clogs upon the estate." *Norfolk's case*, 3 Ch. Cas. 1, 31. Lord Keeper Guildford, in 1683: "If in equity you should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth"; *Norfolk v. Howard*, 1 Ver. 163. Powell, J., in 1698: "But they were not for going one step further because these limitations make estates unalienable, every executory devise being a perpetuity so far as it goes; that is to say, an estate unalienable though all mankind join in the conveyance"; *Scatterwood v. Edge*, 1 Salkeld, 292. Lord Talbot, in 1736: "However unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet * * * considering that the power of alienation will not be restrained longer than the law would restrain it (*viz.* during infancy of

the first taker), which cannot reasonably be said to extend to a perpetuity", etc., *Stephens v. Stephens*, Temp. Talb. 228, 232. Lord Eldon, in 1805: "The question always is whether there is a rule of law fixing the period during which property may be unalienable"; *Thellusson v. Woodford*, 11 Ves. 146. Lord Chancellor Cottenham, in 1849: "These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods"; *Christ's Hospital v. Grainger*, 1 McN. & G. 460. Kay, J., in 1889: "The truth is that under the old feudal law existing in England which is only being broken down slowly by legislation and decisions of the court, and which still exists to a very great extent, there has been a constant attempt on the part of owners of land to limit it in the most elaborate fashion, in order to tie it up as long as possible, and that constant attempt has been constantly defeated both by legislation and the decisions of the courts of law"; *Whitby v. Mitchell*, L. R. 42 Ch. D. 494, 500 (1889). Shaw, C. J., in 1853: "A man cannot, under this general *jus disponendi*, thus tie up property in perpetuity and make it inalienable in his own posterity—it is a legal impossibility"; *Blake v. Dexter*, 12 Cush. 559, 570. Gray, J., in 1865: "The reason of the rule is, that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable"; *Odell v. Odell*, 10 Allen. 1, 5. The foregoing definitions are given as collected in an article by Mr. Fox, 6 Harv. Law Rev., 195 (1892). The following definitions are added: "A perpetuity may * * * be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity"; Saun-

ders, *Uses*, Vol. 1, p. 196 (1823); quoted by Lowrie, J., in *Phila. v. Girard*, 45 Pa. 9, at 26, (1863). "A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation"; Lewis, *Perp.*, Chap. 12, 163 (1843); quoted with approval by Gibson, C. J., in *Hillyard v. Miller*, 10 Pa. 326 at 333 (1849). Mr. Justice Sharswood in *Yard's App.*, 64 Pa. 95 at 98 (1870), said that nothing was denounced by the law as a perpetuity unless it restrained the vesting of the estate beyond the period of a life or lives in being, etc., and further, that a vested interest was not a perpetuity. The learned judge uses the word in two senses: (1) as meaning something which restrains; in this he confused the perpetuity with the rule against perpetuities; (2) as meaning that the future interest itself is a perpetuity. Hare, P. J., in the court below, in *Miffin's App.*, 21 Pa. 205 at 213 (1838): "Agreeably to the view taken by Mr. Gray, a perpetuity is an estate or interest which from its indestructibility and incapacity for alienation, if the law tolerated it, might be transmitted indefinitely, under the authority conferred by the original donor, without power on the part of the holders to treat absolutely as their own, or blend it with the mass of property which each successive owner may dispose of as he thinks proper." "With us in Pennsylvania, the word 'perpetuities' is used in its largest sense, including as well the interests or estates that are inalienable or indestructible, as those which are bad for remoteness"; Sulsberger, J., in *Morris v. Fisher*, 8 D. R. 161 at 163 (1899), see this case criticised, §363, post;

from an examination of these definitions, that the meaning of the term has changed. It appears to have meant (1) the estate on which the future interest is limited; (2) the limitation of the future interest; (3) the future interest which is remote. The judges perhaps had the idea that when the power of dominion was exercised to cut the fee into estates, the whole fee became inalienable, and the rule, by compelling these interests to vest within a certain time, hastened the restoration of the fee to its former condition of alienability. Perhaps by alienability they meant marketability. Mr. Gray defines a perpetuity as follows: "There were two kinds of perpetuities: (1) an estate tail with a condition or clause of cesser intended to prevent alienation; (2) a future contingent interest limited by way of use."⁵ Mr. Gray, however, has not reduced this definition to its lowest terms, and it is open to the objection that it ignores executory devises and future equitable limitations, both of which are unquestionably subject to the rule, and embraces some future interests which take effect in time and cannot, in any sense of the word, be said to be perpetuities. In the first edition of his book⁶ Mr. Gray defines a perpetuity in the modern sense, as meaning a remote interest. He apparently abandoned this idea in the second edition, and offers no substitute other than that quoted above. To speak accurately, a perpetuity is something which lasts forever. A future interest, therefore, obviously cannot be a perpetuity, nor can the limitation of that interest be a perpetuity nor the estate on which the future interest is limited. Mr. Gray seems to have been the first writer to clearly point out that the subject of the discussion is the future interest which is destroyed by the rule. We may, perhaps, venture the statement that a perpetuity is a future interest which is destroyed by the rule. Although this definition is not in accordance with the natural sense of the word, it is at least intelligible and easy of application.

it is submitted, however, that this definition is entirely too broad and is not sustained by even the dictum of any other Pennsylvania judge. A term which has so extended a meaning as that given by the learned judge, is utterly out of place in any scientific conception of the law, is a dangerous two-edged sword to

use in practice, and, furthermore, fails to distinguish between the rule forbidding restraints on alienation and the rule against perpetuities. See §338, post, discussing this distinction.

⁵ See Gray, *Rule Perp.*, 2 ed. (1906), §141e.

⁶ Gray, *Rule Perp.*, 1 ed., (1888), §141.

Meaning of Remote

331. Mr. Gray appears to use the word remote in two senses: first, as meaning the period beyond that prescribed by the rule;⁷ second, as describing an interest which violates the rule.⁸ The word is used in this book as meaning the period beyond that prescribed by the rule.

Discussion as to the Object of the Rule

332. There has been some discussion as to the real object of the rule against perpetuities. Mr. Gray takes the ground that the rule is not aimed at the suspension or restraint of alienation, assigning as a reason that a future interest which is destroyed by the rule is not saved by the fact that it is alienable.⁹ He further concludes that because such alienable interests are subject to the rule, it must follow that the rule is not aimed at alienability; that to suppose that the rule is aimed at the restraint of alienation, is to introduce the idea that the rule has something to do with provisions restraining the alienation of present interests, which idea is erroneous, and confuses the rule with the rule forbidding restraints on alienation. Mr. Jabez Fox, in an article in the *Harvard Law Review*,¹⁰ criticises this view. He quotes from a number of opinions delivered from 1618 to 1853,¹ and takes the ground that it was clearly the idea of the judges that the rule was aimed at preventing inalienability. It is believed that both authors are correct. The judges thought that the rule was aimed at preventing the inalienability of the present estate upon which the future interests were limited, and Mr. Gray contends that this notion introduces the idea that the rule has to do with express restraints on the alienation of present interests.

⁷ Thus, where he says that the interest is bad because too remote; Gray, *Rule Perp.*, 2 ed. (1906), §249d.

⁸ Thus, where he says a limitation after an estate tail can never be too remote, although it may take effect at a period beyond that prescribed by the rule; Gray, *Rule Perp.*, 2 ed. (1906), §443.

⁹ *Rule Perp.*, 2 ed. (1906), Chap. 7, §§268-278d. Mr. Gray says, there seems to be no reason for the extension

of the rule to such interests, because it would always be perfectly competent for the owner of the particular estate to unite with the owner of the future interest in a conveyance of the fee. He admits that the rule applies to such cases. As to the law with respect to the application of the rule to such interests, see §378, post.

¹⁰ *The Criticism of Cases*, 6 *Harv. Law Rev.* 195 (1892).

¹ See §330, n. 4, ante.

The notion does not logically introduce this idea. Such a conclusion has, however, frequently been drawn, and has been caused largely, it is believed, by the vague idea which has been entertained as to the meaning of the word perpetuity.² Many jurisdictions in this country appear to have adopted the view that the rule is aimed at the suspension of alienation, and it has been suggested that this is the better view.³ The two views are, however, reconcilable, as suggested in the next section. It is probably the law in Pennsylvania that the rule is aimed at the destruction of future interests and has nothing to do with restraints on alienation although the Supreme Court have taken no definite position on either side of the question.

The True Object of the Rule Suggested

333. The rule has nothing to do with the alienability or inalienability of the particular future interest which it destroys. If that interest may vest at a period beyond the rule, it is void and nothing can save it. The rule, therefore, is directly aimed at compelling such a limitation of future interests that they will vest within a certain time. As when an interest is remote, it cannot take effect, and there is a reversion or resulting trust of the fee after the termination of the last valid interest, the rule, by fixing an early period at which estates must vest, promotes the return to the former condition in which the fee existed as a whole, in the absolute and untrammelled ownership of a single individual. In that sense, therefore, the rule has the effect, if not the ulterior object, of making the property more alienable. The rule promotes alienability by destroying future interests. Alienability is its object, the destruction of future interests is the means of attaining that object. There is no danger to the community in permitting anyone to acquire an interest at a remote period in future, or in permitting a present estate to be destroyed or taken away at a remote period in the future.⁴ Public policy is against the tying up of property,⁵ and uses the rule against perpetuities as a knife to cut out the limitations, which

² See §330, ante. on meaning of perpetuity.

³ See Review of 2 ed., of Gray, Rule Perp., in 19 Harv. Law Rev., at 635 (1906).

See 4, L. R. A. N. S. 140; 11, L. R. A., 85.

⁴ See §14, ante, for discussion of this point.

⁵ See §§11-14, ante.

if they were allowed to take effect, would produce the consequences which are to be avoided.⁶

Contingencies Analyzed

334. The contingencies upon which future interests may be limited to take effect are impossible of enumeration. They may, however, be divided into two classes: (1) the happening of an event, (2) the ascertainment of a person. The chief difficulty is as to the second case, the usual instance of which is that of a limitation to a class. These limitations are discussed more at length in a separate chapter.⁷ We will first observe that the contingency must happen within the period, and that the chief controversy is over the case of death without issue. These points will be discussed in the order named.

The Contingency Must Happen Within the Period

335. If it is possible for the contingency to happen at a remote period, the interest limited thereon is destroyed, or, as is commonly said, the application of the rule is tested by possible and not by actual events, and the fact that the contingency actually did happen in time will not save the interest.⁸ In like manner, if there is any possibility that the person who is to take may not be ascertained until after the expiration of the period, the limitation to him is void.⁹ No reason for this has been given in the books. A reason

⁶ See §15, ante.

⁷ See Chap. 18, post.

⁸ Thus, to A. in fee, and if B. returns from Rome, to C. and his heirs. The limitation to C. is void, because although B. may return from Rome in the lifetime of A., yet he may not return until more than 21 years after A.'s death. The law does not wait until A.'s death, and then, if B. has returned from Rome, give the estate to C., and, if he has not declare it void. See remarks of Strong, J., in *Smith v. Townsend*, 32 Pa. 434 (1859); Williams, J., in *Donohue v. McNichol*, 61 Pa. 73 at 78 (1869); Paxson, J., in *Smith's Appeal*, 88 Pa. 492 at 495 (1879), which case is open to criticism on this point; see §395, post; *Coggins' App.* 124 Pa. 10 (1889);

the class did actually close in time, but it might not be closed until too remote a period. Lewis, *Perp.*, (1843), pp. 170, 171, 478 and 481. Gray, *Rule Perp.*, 2 ed. (1906), §214. For the purpose of determining questions of remoteness, men and women are deemed capable of having issue as long as they live; Gray, *Rule Perp.*, 2 ed. (1906) §215; *Coggins' App.*, 124 Pa. 10 at 21 (1889). Thus, a limitation over on the probate of a will is void as the will may be probated at a remote period; see 10 L. R. A. N. S. 564.

⁹ A contingency which may happen at a remote period may be controlled by the circumstance that the limitation in question, if it ever takes effect at all upon the contingencies specified, must take effect within the period prescribed.

may be suggested, which is this. In nearly all the cases in which the court has had occasion to consider the application of the rule against perpetuities, the point of view, which is as of the time the litigation is commenced, is between the beginning of the period and the termination thereof: to suspend the application of the rule until the termination of the period and see what actually did happen, would require that the case be kept in court for an indefinite period, and subject all parties to an uncertainty which would be most distressing.¹⁰ On grounds, therefore, of practical convenience in the dispatch of public business, and the desirability of bringing the litigation to a speedy close, the law says that the rule must be applied as of the beginning of the period.¹ It is also immaterial at what time during the running of the period prescribed by the rule the contingency happens or may happen, provided that it cannot happen beyond the period, or, as it is commonly said, the contingency must happen, if at all, within the period.² An interest limited on such a contingency will be contingent at the beginning of the period, but if it takes effect at all, will take effect in time.

An example of this is the case of a gift of a life estate to an ascertained person, or a gift of a term not exceeding twenty-one years, in either case upon a contingency which may be remote. As neither the life estate nor the term can continue into the remote period, they must vest, if they vest at all, in time. This is the case discussed by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §§225 to 229. *Fearne, Remainders*, p. 500, Butler's note.

¹⁰ The court may have been influenced by another consideration. At the time when the rule took its shape, the question which the judges had before them to answer was, how long it would be before the fee was again united in one person and alienable. Looking at the question from that point of view it is easy to see how they would strike out anything which possibly might happen, and only permit that which must vest in time, as otherwise the court could not definitely determine when the estate would be alienable.

¹ The student will here observe the

distinction between the application of the rule against perpetuities and the application of the rule affecting contingent remainders. The law waits to see, in the case of contingent remainders, whether the event will happen in time, and if it does, the remainder is good. The rule against perpetuities does not wait, but immediately cuts out all limitations, which by any possibility may take effect at a remote period.

² Gray, *Rule Perp.*, 2 ed. (1906), §206. For example: to A. in fee, and after B.'s return from Rome in the lifetime of X., a living person, then to Y. The return from Rome upon which the interest is limited to take effect, is B.'s return in the lifetime of X. That, if it happens at all, must happen in time, consequently there is no possibility that it may happen afterward, and the limitation to Y. is, therefore, valid. To A. in fee, and if he dies without issue living at the time of his death, to B. in fee; *Lovett v. Lovett*, 10 Phila. 537 (1873); see remarks at bottom of p. 540.

Death Without Issue

336. Suppose there is a gift over on the death of A. without issue, or some such equivalent expression. The donor may mean death of all the descendants of A., that is, the extinction of all his issue. This is called indefinite failure of issue, because it cannot be known when such failure may occur, if it ever will occur. The donor may mean failure of issue of A. at some definite time. This is called definite failure of issue, and if the failure must occur within the period prescribed by the rule, the gift over is good.³ Mr. Gray says that in the case of real estate the question whether the failure of issue is definite or indefinite is immaterial, for if it is definite the gift over will take effect in time, and if it is indefinite the first taker has an estate tail, to limitations on which the rule against perpetuities does not apply.⁴ In Pennsylvania, however, since all estates tail are turned into estates in fee,⁵ the question in cases of real estate is material. In Pennsylvania a gift over on failure of issue, when that failure must take place within the period prescribed by the rule, is good, while a gift over on indefinite failure of issue is bad.⁶ The rule is the same whether the subject matter of the gift is real estate or personal property.⁷

³ Gray, *Rule Perp.*, 2 ed. (1906), §§211-213. In most cases of definite failure of issue, the failure is at the death of A. This, however, is not necessarily so. It may be fixed at the death of A.'s eldest son, or some other period in the second or third or subsequent generation. A frequent case is the death of A. under twenty-one, without issue, or the death of A. unmarried, without issue.

⁴ *Rule Perp.*, 2 ed. (1906), §212. Not strictly accurate because the definite failure may be at a remote period. See Gray, *ubi supra*, n. 2.

⁵ See §23, *ante*.

⁶ *Hackney v. Tracy*, 137 Pa. 53 (1890).

⁷ The question as to what is definite and what is indefinite failure of issue is a question of construction very often of great difficulty. See, however, the Act of July 9, 1897, P. L. 213, by which words importing indefinite failure of

issue shall be construed to mean definite failure of issue, unless the contrary intent shall appear. This act was held to be constitutional in *Dilworth v. Land Co.*, 219 Pa. 527 (1908); *Siegwarth's Est.*, No. 1, 33 Super. Ct., 622 (1907); *Lewis v. Link-Belt Co.*, 222 Pa. 139 (1908). This act is similar to the acts of 7 William IV. and 1 Vict. c. 26, s. 29, except that the English acts apply solely to wills. For a discussion of the English act see *Lewis, Perp.*, Chap. 15, p. 291 (1843). There was a distinction at common law in the rule of construction between realty and personalty. The Pennsylvania act makes no such distinction. For a case of a gift over of real estate on definite failure of issue, see *Nicholson v. Bettie*, 57 Pa. 384 (1868). For a like gift over of personal property see *Deihl v. King*, 6 S. & R. 29 (1820); see dictum in *Scott v. Price*, 2 S. & R. 59

Separable Contingencies

337. If, however, there are two contingencies, and the interest can take effect on either, and one is within the period and the other is remote, the interest will be allowed to take effect on the one which is valid.¹⁰ The contingencies, however, must be clearly separable by the terms of the gift.¹ If they are inseparable the limitations cannot take effect on either contingency.

Distinction Between the Rule Against Perpetuities and the Rule Forbidding the Creation of Restraints on Alienation

338. The rule against perpetuities prescribes the time within which an estate must take effect.² A restraint on alienation, voluntary or involuntary, has nothing to do with the taking effect of the estate. It does not violate the rule against perpetuities, even though the restraint may last for an indefinite length of time. The donor of an estate may make it go over upon the happening of any contingency, provided that contingency must occur within the limits prescribed by the rule against perpetuities.³ Where, however, the event upon which the estate is to go over is an alienation by the first taker of the estate itself, the limitation amounts to a restraint upon alienation,⁴ and may be void whether the contingency will happen within the limits prescribed by the rule against perpetuities or not.⁵ The result is the same whichever rule is

(1815); *Rapp v. Rapp*, 6 Pa. 45 (1847). For a case of a limitation in equity construed to be definite failure of issue and limitations over within the rule, see *Weinbrenner's Est.*, 173 Pa. 440 (1896).

¹⁰ Gray, *Rule Perp.*, 2 ed. (1906), Chap. IX. *Lewis, Perp.*, (1843) p. 501.

¹ For a further discussion of this point, see §463, post.

² See §§332, 333, ante.

³ See §335, ante.

⁴ Thus, a devise to A. in fee, and upon the expiration of the term of the present President of the United States to X. and his heirs, is valid. A devise to A. in fee, with the proviso that if he shall alienate, then to X., and his heirs, is void, or a proviso, if he alienates, the estate shall re-

turn to the grantor and his heirs. In one case, it may be said, the contingency upon which the estate is to go over happens outside of the estate itself, and in the other it is something connected with the estate and is void. See further as to this point, §§332, 333, ante, §379, post.

⁵ This distinction has not always been observed. In *Appeal of St. Luke's Church*, 1 Walker, 283 (1863), the testator devised a lot of ground to a church, the same not to be disposed of, and if it should at any time be disposed of, then it was to go over to A., B. and C. The court said, "The devise over on the contingency of alienation is not a contingent remainder nor is it a contingent remainder by way of executory devise.

applied. If the rule forbidding restraints, the clause is cut out, and the estate remains in its entirety untrammelled. If the rule against perpetuities, the limitation over is destroyed, and the first estate remains even though the subsequent estate is void.

Lives in Being

339. Any number of lives in being may be taken,⁶ as the period measured by such number of lives amounts to nothing more than the life of the survivor. Mr. Lewis says that the consideration that the lives are all wearing away at the same time, or, as it has been quaintly expressed, that all the candles are burning at once, accounts for the fact that no cases have arisen in which this point has been presented for discussion.⁷ All the lives designated, if more than one, must be in being at the time of the death of the testator or the date of the execution of the deed, as the case may be. A common instance is where there is a gift over on the death of the survivor of a class. If a person born after the creation of the interest may become a member of the class, the gift over is void, because the subsequently born person may be the sole survivor.⁸ The persons whose lives are referred to need have no interest in the estate,⁹ but the lives specified must be of such persons that the fact of their death can be ascertained by the court; as Lord Eldon puts it,¹⁰ "Any number of lives not exceeding that to which testimony can be applied to determine when the survivor of them drops." This remark must be taken to mean—can be applied consistently with the

It is too remote and uncertain. It does not appear that it must take place if it takes place at all within a life or lives in being, and twenty-one years and nine months afterwards." The limitation here was void as a restraint on alienation.

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §§189, 190, 216-219a. In the case of *Cadell v. Palmer*, 1 Cl. & F. 372, (1833), Gray, *ubi supra*, §218, twenty-eight lives were permitted.

⁷ *Lewis, Perp.*, p. 142 (1843).

⁸ Such was the case in *Goddard's Est.*, 198 Pa. 454 (1901). So also in *Davenport v. Harria*, 3 Grant's Cases, 164 (1855), where

there was a gift over on the death of all the grandchildren of the testatrix. As some grandchildren might be born after the testatrix's death, the gift over was invalid. If the limitations over after the death of each member of the class are separable, those which may take effect in time can be upheld and the rest destroyed. See *Smith's App.*, 88 Pa. 492 (1879), stated §395, post; see §337, ante, §463, post.

⁹ Gray, *Rule Perp.*, 2 ed. (1906), §216.

¹⁰ Quoted, Gray, *Rule Perp.*, 2 ed. (1906), §217.

dispatch of public business, and within reasonable, practical limits.¹

Barclay v. Lewis

339a. In *Barclay v. Lewis*² the testator created a trust to pay annuities to his wife, daughter and sons for life, and directed that at the death of the wife and daughter, the estate should be held in trust for the benefit of the children of his sons and daughters until they should reach twenty-one, and then be equally divided among said children. The court held that the limitations over did not violate the rule against perpetuities. The wife and daughter were dead, and the court said, in an amicable action of debt, the sons being alive, that the trust continued to support the ultimate estates. If the testator meant that the lives of the sons were some of the lives in being, the decision is perfectly correct. If, however, the lives of the mother and daughter were the lives in being, the decision is incorrect, as the son might survive his mother and sister, and have a child born more than one year after their death. The limitation to such child would be remote, as the estate would vest in him more than twenty-one years after the expiration of the lives in being. The court seemed to think that the testator meant the lives of the wife, sons and daughter, a construction which is open to objection. The whole estate was given in trust, subject to annuities to the sons after the death of the wife and daughter.

The Period of Twenty-one Years

340. The period of twenty-one years may be taken in gross, that is, limited simply as a space of time,³ without reference to any minority.⁴ It seems, in like manner, that the term of

¹ Thus, suppose the case of a gift over upon the death of the survivor of all persons now living in Philadelphia, and entitled to a fee simple estate in any real estate situate within the county. It would be possible to ascertain from the records who all the present owners of fee simple estates are, and they being ascertained, to determine when the survivor was dead. The determination of the fact would be so difficult and take so long, that the gift over would probably be declared void. A gift over on the death of the survivor of the

present members of the United States Senate would probably be valid.

² 67 Pa. 316 (1871).

³ Challis, *Real Prop.*, 2 ed. (1892), §169.

⁴ Gray, *Rule Perp.*, 2 ed. (1906), §223.

Consequently, a limitation over at a period more than twenty-one years after the end of the life or lives in being is void. *Coggins' App.*, 124 Pa. 10 (1889); *Gerber's Est.*, 196 Pa. 366 (1900), stated §474, post; *Boyd's Est. No. 1*, 199 Pa. 487 (1901), stated §398 post.

twenty-one years may be taken without being preceded by a life or lives in being.⁵ It seems to have been assumed that such is the law, although the books are not very clear on the subject. Mr. Gray does not refer to the point. Mr. Lewis says⁶ that the term of twenty-one years is an integral part of the period of remoteness and not supplemental to it, and that a limitation to take effect within twenty-one years would be good.⁷ No decision on the point has been found in Pennsylvania, although there are a number of cases in which this appears to have been assumed as the law.⁸ The term of twenty-one years, however, it seems, cannot be made to precede a life in being. If it is taken as a term in gross, it must constitute the entire period and no life can be added after twenty-one years.⁹ No case has been found as to this point either.

The Period of Gestation

341. Mr. Gray lays down two rules:¹⁰ (1) Every life is to be considered as beginning from the time of conception. (2) A future interest to begin when or before a person reaches twenty-one is not too remote if such person must be begotten, though not born, within a life in being at the creation of the interest. The period must refer to an actual gestation, and there may, as Mr. Gray points out, be two or three periods of gestation.¹ No case on this point has been found in Pennsylvania.

When the Period Prescribed by the Rule Begins to Run

342. The period prescribed by the rule begins to run from

⁵ Thus, in the case of a gift to A. for twenty years and then to B. and his heirs, or, to B. and his heirs twenty-one years after the testator's decease, the limitation to B. is void.

⁶ Lewis, *Perp.*, p. 560 (1843).

⁷ See also, Perry, *Trusts*, Vol. 1, §380, 5 ed. (1890); Fearn, *Remainders*, p. 500, Butler's note. Stewart, P. J., in the court below in *Johnston's Est.*, 185 Pa. 179 at 184 (1898).

⁸ Thus, a gift to a class which of itself will close at a remote period, will be made valid by a direction to distribute at the termination of a period of years less than twenty-one; *Williamson's Est.*, 143 Pa.

150 (1891); *Forney's Est.*, 161 Pa. 209 (1894). Gift at the end of five years from the testator's decease, or before or after, in the discretion of the executors; *Searight's Est.*, 163 Pa. 218 (1894). Gift to A. "eighteen years after my decease;" *Kaufman v. Burgert*, 195 Pa. 274 (1900).

⁹ Thus, in the case of a gift to A. for twenty-one years, and after the death of his grandchildren living at the expiration of the twenty-one years, to B. and his heirs, the limitation to B. and his heirs would be remote.

¹⁰ *Rule Perp.*, 2 ed. (1906), §§220-222.

¹ *Rule Perp.*, 2 ed. (1906), §§221, 222.

the date of the creation of the interest, and is to be computed from the date of the testator's death, in the case of wills, and from the date of the deed, in the case of a gift *inter vivos*.² No case on this point has been found in Pennsylvania. The law is so plain and easy of application that no controversy appears to have ever arisen as to it.³ There are several corollaries of the rule, which will be discussed in the ensuing sections.

Rule Does Not Affect the Right to Possession

343. We have seen that an interest may be vested according to the common law notion, even though there is no present right to enjoyment. Such an interest may be called a quasi future interest.⁴ As it is this vesting according to the common law idea which fulfills the requirements of the rule against perpetuities, it follows that the circumstance that the right to possession or enjoyment of a vested interest will not accrue until after the period prescribed by the rule has elapsed is of no consequence.⁵ This may happen when the preceding estates extend into the forbidden period, and when the fee is subject to a term of years.⁶ A clause, therefore, postponing the enjoyment of a vested absolute interest does not come within the purview of the rule against perpetuities.⁷ This principle is clearly illustrated by a Pennsylvania case which will now be discussed.

Rhodes' Estate

344. In *Rhodes' Estate*,⁸ the testator gave his estate in trust for his wife and daughter for life, and, after their death,

² Gray, *Rule Perp.*, 2 ed. (1906), §§231, 232. As to the case of a deed, see *Lewis, Perp.*, p. 172 (1843), and *Miffin's App.*, 121 Pa. 205 (1888), stated §401, post, *semble*. Mr. Gray makes no observations as to settlements by deed.

³ For the application of the principle to powers of appointment, see §§388-401, post, and for the erroneous application thereof to the case of powers in a trustee, see §§410-436, post. For the case of a settlement by deed where the limitations violated the rule, computing the period from the date of the deed, see *McCullough*

v. Seitz, 28 Super. Ct. 458 (1905), stated, §452, post.

⁴ See §41, ante.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §205.

⁶ See §45, ante, on remainders subject to a term of years; §363, post, on the application of the rule to vested remainders subject to a term of years.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), Chap. IV. See §487, post, on the distinction between the rule forbidding restraints on enjoyment and the rule against perpetuities.

⁸ 147 Pa. 227 (1892).

after providing for certain annuities, the residue was to be equally divided among his nieces and nephews then living. He then, by codicil, directed that if his daughter should die leaving a child or children surviving under the age of twenty-five, that his trustees should pay to each of said children \$350 a year until they were twenty-five years of age, when such payment should cease, and that his estate should not be divided until after all the children of the daughter had arrived at twenty-five. At the audit of the trustees' account, the daughter, presumably, although not so stated, as his next of kin, claimed the whole estate on the ground that the gifts in the codicil violated the rule against perpetuities. The auditing judge, Hanna, P. J., decided that the limitations were valid and dismissed the claim of the daughter, which decision was sustained by the court in banc and by the Supreme Court, on appeal. As was pointed out by the auditing judge, these annuities each vested immediately upon the death of the daughter, no matter what age her children were under twenty-five, and the fact, therefore, that the payment might continue to a period beyond the rule did not affect the validity of the limitations.⁹ The gift to the nieces and nephews was plainly contingent but valid, as it must vest in time, to wit, at the death of the daughter.¹⁰ Although vested then, there was a possibility that the possession thereof might be postponed to a future time, because of the presence of the vested interests in the children of the daughter. They were vested in time, but continued to exist after the expiration of the period. The enjoyment, therefore, of the valid contingent interests was postponed to a period beyond that prescribed by the rule, because of the presence of prior interests in the children of the daughter. That, however, did not invalidate the contingent interests, because the rule has to do only with the vesting, and not with the time of coming into enjoyment.¹

⁹ Where the interest takes effect in time the fact that it extends beyond the period is immaterial. See §345, post.

¹⁰ On this point overruling *Donohue v. McNichol*, 61 Pa. 73 (1869), stated §348, post.

¹ See also *Hubley v. Long*, 2 Grant's Cases, 268 (1852), where the interest

might have vested in a minor within the period, and the minor might not arrive at twenty-one until some years after the expiration of the period and the gift was nevertheless valid. See also *Barclay v. Lewis*, 67 Pa. 316 (1871) *semble*, stated §339a, ante.

Continuation of a Vested Interest Into the Remote Period Valid

345. When an interest must vest within the period prescribed by the rule, it is saved, and the circumstance that it may not terminate after the period prescribed by the rule has passed, is of no consequence.² If this were not so, no future interest could be remote. It is only by the circumstance of a particular estate extending into the remote period that there is a possibility of an interest violating the rule against perpetuities.

Preliminary Discussion of Pennsylvania Cases on the Rule

346. There are very few cases in Pennsylvania involving the application of the rule against perpetuities which are open to objection or call for any discussion. These cases will now be noticed.³

Chambers v. Wilson

347. In *Chambers v. Wilson*⁴ the testator devised certain real estate "to any one of my brothers' or sisters' children that shall or may come from Ireland first. * * * If so be they shall or do come within the term of six years, after they shall get lawful word hereof by writing, for which cause I do enjoin upon my aforesaid wife Martha, her heirs and assigns, to use all possible diligence to communicate unto all my aforesaid brothers' and sisters' children the import of this my will, as soon as a declaration of peace shall be between Europe and America," with a gift over to A., B. and C., in equal shares, if none of the brothers' or sisters' children came

² Lewis, *Perp.*, p. 173 (1843); Gray, *Rule Perp.*, 2 ed. (1906), §§232-246; Stewart, P. J., in *Johnston's Est.*, 185 Pa. 179 at 185 (1898), stated §472, post; *Penna. Co. v. Price*, 7 Phila. 465 (1870); unfortunate language in this case criticised by Gray, *ubi supra* §237a. In *Brisben's App.* 70 Pa. 405 (1872), there was a direction to sell a certain tract of land, and a gift of the proceeds of the sale to a daughter. The testator then provided for an annuity to be paid to his daughter until she should receive the proceeds of the sale of said tract of land. That conceivably might not be

until a remote period. The annuity, however, vested in time, so the remoteness of its termination was immaterial. *Lakey's Est.*, 30 Pa. C. C. 287 (1904); *Rhodes' Est.*, 147 Pa. 227 (1892), stated §344, ante; *Lennig's Est.*, 154 Pa. 209 (1893); *Ronckendorff's Est.*, 1 D. R. 258, s. c. 11 Pa. C. C. 447 (1892), stated §397, post; *Lawrence's Est.*, 136 Pa. 354 (1890), stated §396, post; *Owens' Pet.*, 3 D. R. 328 (1894), in which case the ultimate limitation was void, see §452, post.

³ See also cases discussed in *Chaps. 16-19*, post.

⁴ 2 Watts, 495 (1834).

within the time specified. The action was ejectment by the heirs of A. against one claiming under the executrix. The report is obscure, and the chief attention of the court and counsel seems to have been directed to the question whether the direction as to giving notice had been properly fulfilled, without observing that the limitation violated the rule against perpetuities, and was therefore void anyhow. The gift was to such one of a class composed of the brothers' and sisters' children who should come upon a certain contingency. A niece or nephew of the testator born more than twenty-one years after the testator's death might come from Ireland at a remote period. The notice was to be given by Martha, her heirs and assigns, and might, therefore, be given at any time in the future. If the giving of the notice had been limited to the life of Martha, the limitation would have been valid, and in that case the circumstance that a child born after the death of the testator would be the first to take advantage of the notice, would be immaterial. The remainders to A., B. and C. were vested and valid.

Donohue v. McNichol

348. In *Donohue v. McNichol*⁵ the testatrix gave her estate in trust for her son John for life,⁶ and upon his death, leaving issue, in trust for such issue, and after the death of the issue, in trust for the use of her lawful heirs, and on the death of John without issue, to her lawful heirs, their heirs and assigns.⁷ John died without issue and his widow filed a bill in equity for a conveyance of a half interest in the real estate for life. The court said that John took a fee. Williams, J., in the Supreme Court said that if the testatrix meant her heirs at her death, the limitation was valid, but that if she meant her heirs at John's death or at the death of his issue, the limitation over was void for remoteness. Since John was the heir of his mother, at her death it was immaterial to the decision of the case whether the limitation to the heirs at her death was remote or not, as he would take anyhow as pur-

⁵ 61 Pa. 73 (1869).

⁶ As to the trust for life, see §542, post, on Discretion.

⁷ The two contingencies, the death of John leaving issue, and the death of John without issue, were clearly separable,

and the two gifts over, therefore, were distinct and could take effect independently of each other; see Gray, *Rule Perp.*, 2 ed. (1906), §353a; see §337, ante, §463, post.

chaser under the limitation if it was valid, and as heir at law of his mother if it was invalid. The case, therefore, construes the word heirs to mean the testatrix's heirs at her death. If this is so, the limitation was clearly valid. Since, however, John was not his mother's heir at his death, and the limitation to those heirs seems to be plainly valid,⁸ there is no way of getting around the erroneous reasoning of the court. The case is probably no longer the law.⁹

Seibert v. Wise

349. In *Seibert v. Wise*¹ the devise was to testator's two nephews, one-half to John and one-half to Jacob, share and share alike, to hold to themselves and their heirs, the survivor or survivors of them forever. Jacob contracted to sell his one-half, having previously executed a deed to bar any estate tail. Judgment was rendered for Jacob on a case stated to determine whether his title was marketable. On appeal, affirmed by the Supreme Court, Sharswood, J., saying that if the word survivor meant survivorship between John and Jacob, there was a devise over after a fee, which could not stand as a remainder nor as an executory devise, because contrary to the rule against perpetuities. For this conclusion, the learned judge gave no reason, and as survivorship in either case would be determined at the expiration of a life in being, the life of John or Jacob, it is submitted that the remarks are open to serious objection.²

Ward's Estate

350. It appears that in *Ward's Estate*³ there was a gift in trust for the children of the testator absolutely, with a proviso that if they died under thirty, having married and leaving issue, the share of the one so dying should remain invested and apportioned among such issue when they should

⁸ This is plain, as the interest would vest in them immediately at her death, and therefore take effect within the period prescribed by the rule.

⁹ The case cited by Ashman, J., in *Ronekendoff's Est.*, 11 Pa. C. C. 447 (1892), a. c. 1 D. R. 258, as an authority for the proposition that it is immaterial whether the interest exceeds the limita-

tions prescribed by the rule, if it begins within the limit.

¹ 70 Pa. 147 (1871).

² See *Lovett v. Lovett*, 10 Phila. 537 (1873), *Watson, P. J.*, at bottom of p. 540.

³ 8 D. R. 701 (1899). The case is badly reported and the words of the will are not given.

have arrived at the age of thirty years. Such limitations were, of course, as the learned judge said, void. The issue might take twenty-one years after the death of their parents.

Pennsylvania Cases Where the Limitations Did Not Violate the Rule

351. In a number of cases, which are collected in the note,⁴ the limitation did not violate the rule against perpetuities. That was so clear that it is not strictly necessary to cite those decisions. As, however, in each case it seems to have been argued, for some unknown reason, that the limitations were remote, and the court found it necessary to say that

⁴ To A., and if she dies under twenty-five and without issue born, to X: *Kelso v. Dickey*, 7 W. & S. 279 (1844). To A. in fee, and if he dies before he marries, to B. and his heirs: *Jessup v. Smuck*, 16 Pa. 327 (1851). To my wife for life, then to her issue by me begotten, but if no heir by me should live to the age of twenty-one years or marry, then to the children of my sister S. and my brother W.; limitation over was an executory devise and valid; *Wells v. Ritter*, 3 Whart. 208 (1837). To A. for life, remainder to her children in fee, A. then having a child, "provided if she die without issue, to my son B.;" limitation to B. not remote; dictum Gibson, C. J., and Kennedy, J., in *DeHass v. Bunn*, 2 Pa. 335 (1845). Gift by deed of trust to pay the income for the lives of three persons and of the survivor or survivors, and after the death of the survivor, in trust for the right heirs of the three, does not violate the rule against perpetuities; *Goehring's App.*, 81½ Pa. 283 (1875). Gift over on definite failure of issue at the death of the first taker; *Lovett v. Lovett*, 10 Phila. 537 (1873). Gift by deed in trust for daughter A., for life, upon her death in trust for her children living at her death, and the issue of such as shall be deceased to be conveyed to them upon attaining twenty-one, and in default of

such children or issue attaining twenty-one, then in trust for such persons as would have been entitled had the grantor died possessed thereof, after the death of A., without leaving issue, him surviving. Limitations to the heirs, valid; contingent until the death of A., and ascertained, if at all, within the period prescribed by the rule; *Phillips's App.*, 93 Pa. 45 (1880). In *Myer's Est.*, 17 Phila. 425 (1884), the words of the will are not given, so that the case is of little value, as it cannot be told whether the remarks of the court are dicta or not. The court seems to concede that the remarks as to perpetuities were dicta, and there is nothing in the opinion of the court which is open to objection. In *Richardson's Est.*, 16 Phila. 326 (1884), the report is obscure as to this point, and the words of the will are not given. Gift if A. should die without making a certain appointment, to B. a living person for life, with special power to appoint in B., and in default of appointment by B., to his right heirs; limitation to heirs valid; *Brooks's Est.*, 140 Pa. 84 (1891). Gift in trust in the events which happened, for the life of A., B. and C., grandchildren of the testator, and at their death, in further trust as respects the share of each for the use of their children and the issue of a deceased child in equal shares, and in the case of the death of either A. or B. with-

the limitations did not violate the rule against perpetuities, it seems desirable to refer to these decisions for the sake of completeness.

out children or issue, or without children or issue which shall reach twenty-one, to the survivor of the grandchildren for life, with the remainders to the children of the survivor, and in default of such children, to form part of the residue: *Weinbrenner's Est.*, 173 Pa. 440 (1896). Gift in trust, in the events which happened, for A., B., C., D. and E. for life; at

their death to their children, until they attained the age of twenty-one years, when each shall receive his or her share of the principal in the proportion that he or she received or were entitled to the income, agreeably to the intestate laws of the state of Pennsylvania; *Smith's Est.*, 210 Pa. 604 (1905). See also *Horner's Est.*, 10 D. R. 729 (1901).

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CHAPTER 16

INTERESTS SUBJECT TO THE RULE

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Preliminary Discussion

360. It is the purpose of this chapter to discuss and classify the interests which are subject or are not subject to

the rule against perpetuities. The common statement is that a vested interest is not subject to the rule.¹ The exact point involved is this: an interest which may vest at a remote period is, if it is otherwise lawful,² prevented by the rule from ever taking effect. The statement, therefore, that an interest is or may become vested necessarily involves the idea that it has or will escape the operation of the rule. It may perhaps put the matter more clearly to say that a vested interest does not lie in the path along which the rule against perpetuities exercises its destroying effect.

Reversions

361. A reversion is not subject to the rule against perpetuities. Mr. Gray³ says that it is because a reversion is vested. While this is perhaps a sufficient reason, there is another principle involved. If the ulterior interest limited is remote, it cannot take effect, and is as if it had been omitted from the deed. The gift stands as if the limitations had stopped with the preceding particular estate, in which latter case there would, at common law, be an undisposed of residue which would remain in the grantor and his heirs as a reversion. The existence of the reversion in this case is, therefore, the inevitable consequence of the application of the rule to the void ulterior limitation. If the property did not revert to the grantor, to whom would it go: to a stranger or to the state? No other disposition is possible.⁴ Where there is an express reversion the case is the same. The direction in the deed is coextensive with the disposition by law.

Vested Remainders

362. A vested remainder is not subject to the rule against

¹ A vested interest, whether legal or equitable, in realty or personalty, is not subject to the rule against perpetuities: Gray, *Rule Perp.*, 2 ed. (1906), §205; Clark, J., in *Lawrence's Est.*, 136 Pa. 354 at 363 (1890); *Rhodes' Est.*, 147 Pa. 227 (1892). It has been pointed out, see §§38-41 ante, that the notion of vesting has come down from the doctrine of the early common law governing remainders in

land, and the distinction between a vested and a contingent interest in modern times turns on a mere form of words.

² As to this point, see §379, post.

³ *Rule Perp.*, 2 ed. (1906), §283.

⁴ The non-application of the rule to the reversion is a direct corollary of the principle disposing of the property embraced in a void ulterior limitation, as to which see Chap. 19 post.

perpetuities.⁵ Vested remainders were allowed at common law several centuries before the rule against perpetuities was evolved.⁶ Historically, therefore, the rule cannot apply and no one has ever suggested any reason why the rule should be extended to cover a vested remainder. A vested remainder is a quasi future interest;⁷ in so far, however, as the vesting in interest is concerned, it is a present interest, and that is a sufficient reason why the rule should not apply. If the suggestion made⁸ is sound, that the rule against perpetuities was originally evolved to limit the gap in the seisin or possession made possible by the validity of the limitations under the statute of uses, there is another reason why the rule does not apply to vested remainders. Whatever the reason may be, the law is plain. Mr. Gray⁹ mentions the case of a remainder to a class as an exception to this application of the rule against perpetuities. He is forced into this position by his acceptance of the theory that a remainder to a class is a vested remainder. The objections to this theory have been pointed out,¹⁰ and the position taken that a remainder to a class is really a remainder to each particular member of the class, and is either vested or contingent, under the same principles which apply to remainders to an individual. It is, therefore, not an exception to the application of the rule against perpetuities.¹

Vested Remainder Subject to a Term of Years

363. There can be no remainder after a term of years. When the term and the fee are granted together, the gift is construed as a grant of the reversion subject to the term.² The limitations of the fee are, therefore, to be considered, so far as the application of the rule against perpetuities is concerned, as if the term did not exist. The fact that the possession of the vested remainder is postponed to a period beyond that prescribed by the rule, by the presence of the term, is

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §§205, 205a, 283. See Kales, 20 *Harv. Law Rev.* (1907), p. 192, et seq.

⁶ Vested remainders go back as far as the thirteenth century. The rule against perpetuities dates only from the seventeenth century. See §326, ante.

⁷ See §41, ante.

⁸ See §364, n. 8, post.

⁹ *Rule Perp.*, 2 ed. (1906), §205a.

¹⁰ See §§67-71, ante.

¹ For a discussion of the application of the rule to gifts to a class, see §445, post.

² See §45, ante. It is, of course, possible for the gift to be so worded that the ultimate limitation of the fee is contingent upon the termination of the estate for years, and must, therefore, take effect, if it takes effect at all, as an executory devise.

immaterial.³ This principle was overlooked in the case of *Morris v. Fisher*.⁴ In that case there was a devise to A. for life, and after her death to B. for ninety-nine years, if he should so long live, and after his death, then to the issue of his body during the remainder of the term, and after the expiration of the term, or if B. should die without leaving issue, then to W. and the heirs male of his body. A. died, B. entered into possession, and his issue succeeded him. The term of ninety-nine years expired, and the heir male of W. brought ejectment. Judgment against him in the court below was reversed on appeal by agreement of counsel. Sulzberger, J., delivered the opinion of the Common Pleas, and the grounds of his decision are difficult to understand. The exact point involved was this: the tenant in tail claimed possession, the term having ended. It was objected that he could not recover because his remainder was remote. To this it was replied that the remainder was not remote because there was a direct limitation of the estate tail subject to the term. The counsel for the defendant rejoined that the gift was not really an immediate gift subject to the term; that although it had this appearance, owing to what he termed a trick of the conveyancer, it was really a gift to the heir male ascertained at the expiration of the term of ninety-nine years. This raised a question of construction to which no attention was paid by the learned judge, who apparently admitted that, according to the common law, there was an immediate gift of the fee tail subject to the term, and then undertook to demonstrate that the law of Pennsylvania was different. In doing this his attention was diverted by the attempted estate tail of the term.⁵ This point did not figure in the case, as the term had expired, and the only question was whether the heir male of W. could recover on his title as tenant in tail. The decision is totally opposed to the common law and to reason, and, as has been aptly observed,⁶ the reversal by agreement of counsel indicates that the counsel for the defendant had little hopes of holding his judgment. No other case on the point has been found.

³ §343, ante. A term of years of extravagant length, while an undesirable state of affairs, does not, it is believed, call for the application of the rule against perpetuities. The existence of the term, if it is

anything, is a restraint on the free use and disposition of the fee.

⁴ 8 D. R. 161 (1899).

⁵ See further as to this, §87, n. 4, ante.

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §209a.

General Discussion as to the Application of the Rule Against Perpetuities to Contingent Legal Remainders

364. There has been much difference of opinion as to whether the rule against perpetuities applies to contingent legal remainders in real estate.⁷ The difference of opinion which exists may be summed up as follows: it is contended, on the one hand, that the rule does not apply to contingent remainders, because (1) contingent remainders were allowed as early as 1430, nearly 300 years before the rule against perpetuities originated, and therefore, historically, it cannot apply; (2) there is no occasion to extend the rule to contingent remainders in modern times, because such remainders are destructible, and (3) because there is a rule of the common law that you cannot have a possibility upon a possibility, which rule governs the limitation of contingent remainders.⁸ On the other hand, it is contended that although the rule does not apply historically, it should be extended in modern times to cover contingent remainders, (1) because they have ceased to be destructible; (2) because there is no rule of the common law that you cannot have a possibility upon a possibility; (3) that, as there is no other rule to govern remote contingent remainders, the rule against perpetuities should be extended to cover the case; that, even if there is a rule that you cannot have a possibility upon a possibility, it is undesirable that such a rule should be adopted in a

⁷ See Gray, *Rule Perp.*, 2 ed. (1906), §§284-298.

⁸ There was possibly another reason why the rule did not apply to contingent remainders, which was noticed by Sir Edward Sugden when delivering an opinion as Lord Chancellor of Ireland, in the case of *Cole v. Sewell*, 4 Dr. & W. 1. (See Gray, *Rule Perp.*, 2 ed. (1906), §287, n. 1, where a portion of the opinion is given; and also Williams, *Real Property*, 6 Amer. ed. (1886), p. 274, n.; Challis, *Real Prop.*, 2 ed. (1892), pp. 93, 184.) The Lord Chancellor said: "In the latter case the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail or not, according to that event. It may thus be prevented from taking

effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder." It is submitted that the Lord Chancellor had in mind here the point that a perpetuity consisted in the gap between the termination of the preceding estate and the beginning of the executory devise or conditional limitation. If this is so, and that is what the rule against perpetuities was originally aimed to limit, then there was no reason at the time the rule was evolved for its application to contingent remainders. If this reason has any weight it explains why the rule does not apply to vested remainders, because in that case there is no gap in the seisin; see §362, ante.

jurisdiction not bound by any precedent, as limitations may be valid under that rule which would be invalid under the rule against perpetuities, and therefore, its adoption would produce a lack of uniformity in the law. Mr. Gray takes the latter view, and comes to the conclusion that the rule against perpetuities does apply to contingent legal remainders.⁹

The Law in Pennsylvania as to the Application of the Rule to Contingent Legal Remainders

365. The question does not seem to have been passed on in Pennsylvania and is open on the authorities.¹⁰ Now, at common law it was said that the rule did not apply to contingent legal remainders because that remainder could never take effect after the expiration of the preceding particular estate, that is, the contingent remainder was destroyed by the natural expiration of the preceding estate before the happening of the event upon which the remainder was limited to take effect. If, therefore, as seems to be the case, a contingent remainder is destructible in Pennsylvania¹ in exactly the same way as it was at common law in this particular, and the destructibility in this particular at common law was the reason why the rule did not apply, there seems to be much force in the position that the rule does not apply in Pennsylvania. No trace has been found in the Pennsylvania cases of any application of the rule that you cannot have a possi-

⁹ Gray, *Rule Perp.*, 2 ed. (1906), §§123-134, 287-298. Mr. Challis, *Real Prop.*, 2 ed. (1892), pp. 183, 184, 185, says that the rule does not apply to legal contingent remainders, because they were allowed before the rule against perpetuities was evolved, and he further says, at p. 185, that any objection to the validity of a contingent remainder on the ground of the rule against perpetuities, is not so much an objection against the time of vesting as an objection against the duration of the preceding estate. Mr. Kales, 20 *Harv. Law Rev.*, 199-200, (1907), takes exception to Mr. Gray's position that the rule does apply to contingent legal remainders, because he (Gray) is not consistent in that he does not ap-

ply the rule to a vested remainder subject to be divested, that is, a vested remainder subject to a condition precedent to its coming into possession. The objection to the view Mr. Kales takes of this kind of vested remainder has already been noticed; see §63, n. 2, ante; and also §46, ante. If this objection is sound, there is no inconsistency in Mr. Gray's position.

¹⁰ Nothing has been found in Pennsylvania on the point except a dictum of Penrose, J., in the court below in *Coggins' App.*, 124 Pa. 10 at 19, (1899), as follows: "A legal remainder in lands, whether vested or contingent, is not affected by the doctrine of perpetuities."

¹ See §62, ante.

bility upon a possibility.² The Supreme Court is, therefore, free from any necessity upon precedent of applying this rule.³ The question whether the rule against perpetuities applies to contingent legal remainders in Pennsylvania is one of practical expediency rather than of principle or reason. There is no controlling reason why the rule should not apply. There are strong practical reasons why it should apply, and while, therefore, in this condition of the authorities, no statement can be ventured as to the law, it at least may be said that the Supreme Court would not go far astray if they should decide that the rule against perpetuities applies to contingent legal remainders in real estate.

Easements

366. Easements and rights over the lands of another are present interests and not subject to the rule.⁴ The right in the dominant tenant to enter on the servient tenement in pursuance of the easement, does not call for the application of the rule against perpetuities.⁵ A grant of an easement, however, can be made to begin in futuro and such a grant seems to be subject to the rule.⁶

Rights of Entry for Condition Broken

367. A right of entry for condition broken⁷ is apparently subject to the rule in England,⁸ although there has been some difference of opinion on the point. Mr. Gray⁹ says that such rights are clearly within the rule, and that there is nothing in the history of the rule to exempt them from its application, but that the general law in the United States is that they

² See §66, ante.

³ The rule is mentioned by the late Mr. Mitchell in his learned work on Real Estate & Conveyancing in Penna. at p. 236 (1890), apparently relying on the authority of Mr. Williams as a modern substitute for the old rule that you cannot have a possibility upon a possibility. The learned author appears to confuse this rule with the rule against perpetuities.

⁴ Gray, Rule Perp., 2 ed. (1906), §279. Profits a prendre are practically unknown in Pennsylvania. In so far as the servient tenement is concerned, they are restraints on the enjoyment of property.

⁵ Gray, Rule Perp., 2 ed. (1906), §281.

⁶ Gray, Rule Perp., 2 ed. (1906), §316. No case in Pennsylvania has been found as to this point.

⁷ As to the nature of such a right, see §76, ante. No case of a condition attached to a conveyance of personal property has been found in Pennsylvania. The discussion, therefore, is confined entirely to gifts of real property.

⁸ Gray, Rule Perp., 2 ed. (1906), §299-311a, where this subject is discussed. Lewis, Perp., pp. 618, 619 (1843).

⁹ Rule Perp., 2 ed. (1906), §§304, 310.

are exempt from the operation of the rule.¹⁰ The question has not been authoritatively decided in Pennsylvania, and it is not perfectly clear just what the law is. In a number of cases the condition did not violate the rule.¹ In other cases the condition did violate the rule in fact, and it was held that it could be taken advantage of without the circumstance that it did violate the rule being considered by the court.² In a number of other cases, commonly cited as authorities on the subject, the court held that the grantor, for one reason or another, apart from the rule, could not take advantage of the condition.³ There is, as Mr. Gray observes,⁴ a practical inconvenience in permitting the validity of such conditions. The difficulty thereby occasioned in clearing up the title to property is frequently very great. The common opinion, however, seems to be that the rule does not apply to such conditions, and as the Supreme Court has expressly sustained the right to recover in two cases where the condition violated the rule, and no one has thought it necessary to raise the point in a case where the court could not evade the question,⁵ there seems to be good reason to say that it is a rule of property in Pennsylvania that the rule against perpetuities does not apply to conditions of re-entry. At least until the Supreme Court has passed upon the question it will be dangerous to pass a title containing such a condition that has not been released. The non-application of the rule to the clause of re-entry commonly inserted in ground rent deeds seems to have been so universally assumed in Pennsylvania, that any decision to the contrary would probably be most alarming and unsettle a great many titles.⁶ And it is not likely

¹⁰ See further 1 Am. Law Rev. 265 (1867); 17 Law Quar. Rev. 32 (1901).

¹ *Hamilton v. Elliott*, 5 S. & R. 375 (1819); *Bear v. Whistler*, 7 Watts, 144 (1838); *Westenberger v. Reist*, 13 Pa. 594 (1850).

² *Pickle v. McKisick*, 21 Pa. 232 (1853); *Courtney v. Keller*, 4 Penny. 38 (1884).

³ *M'Williams v. Nisly*, 2 S. & R. 507 (1816); *McCormick v. Connell*, 6 S. & R. 151 (1820); *Keneg v. Elliot*, 9 Watts, 258 (1840); *Sharon Iron Co. v. City of Erie*, 41 Pa. 341 (1861).

⁴ *Rule Perp.*, 2 ed. (1906), §304.

⁵ The question was argued in *Sharon Iron Co. v. City of Erie*, 41 Pa. 341 at 347 (1861), but case went off on another point.

⁶ No practical inconvenience has been felt on this point because the right to re-enter is reserved to the grantor, his heirs and assigns, and as his assigns have the right to release the clause and extinguish the rent, the difficulty mentioned by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §304, of hunting up the scattered heirs, does not exist in Pennsylvania.

that the Supreme Court will ever apply the rule to such a clause. Even if a clause in a ground rent deed be admittedly valid on the ground of common error, there is room to distinguish between a clause of re-entry to enforce the payment of a particular sum of money, which is the case of a ground rent deed, and a clause of re-entry for other purposes.⁷

Possibilities of Reverter

368. The rule against perpetuities probably does not apply to possibilities of reverter in Pennsylvania,⁸ although the point has never been actually decided by the Supreme Court.⁹ If determinable fees are valid in Pennsylvania, and it seems that they are,¹⁰ the validity of a possibility of reverter inevitably follows because if there is no such possibility there can be no determinable fee. The error, as Mr. Gray points out,¹ was in allowing the determinable fee in the first place. It is often an extremely difficult question of construction to determine whether in a given case there is a condition or a determinable fee.²

Future Legal Interests in Personal Property

369. Mr. Gray says that the question whether the rule applies to future legal interests in personal property depends on the nature of such a future interest.³ A future interest in a chattel real created by will is an executory bequest in Pennsylvania,⁴ to which, therefore, the rule applies, although no decision to this effect has been discovered.⁵ The nature

⁷ See article by Mr. Arthur Mackey in 17 Law Quar. Rev. 32 (1901).

⁸ There is some difference of opinion as to whether it applies in England. Mr. Lewis, *Perp.*, p. 621 (1843), thinks that the rule does not apply.

⁹ In *Slegel v. Lauer*, 148 Pa. 236 (1892), the court permitted the plaintiff to enforce a possibility of reverter which violated the rule against perpetuities, although no objection on that ground was called to the attention of the court.

¹⁰ See §27, *ante*.

¹ Gray, *Rule Perp.*, 2 ed. (1906), §312. A possibility of reverter after a conditional fee cannot exist in Pennsylvania, as con-

ditional fees can no longer be created. The point, therefore, noticed by Mr. Gray, *ubi supra* §313, that the possibility of reverter in such a case would not be remote, cannot arise in Pennsylvania.

² For an example of such an ambiguous limitation, see *Courtney v. Keller*, 4 Penny. 38 (1884).

³ *Rule Perp.*, 2 ed. (1906), §§319, 320, 321, Appendix F.

⁴ See §93, *ante*.

⁵ Except a dictum of Lewis, P. J., in the court below, in *Hubley v. Long*, 2 Grant's Cases, 268 at 270 (1852), where he said that the rule applies to chattel interests.

of a future legal interest in a chattel personal created by will is uncertain, and it is doubtful whether a future interest can be created in either case by deed *inter vivos*.⁶ As no case on the point has been found, no statement can be ventured as to the application of the rule.

Executory Devises and Bequests

370. Executory devises and bequests are undoubtedly subject to the rule against perpetuities.⁷

Shifting and Springing Uses

373. Shifting and springing uses are subject to the rule,⁸ so also are contingent uses. If the statute of uses executes the contingent use,⁹ it becomes at once on theory a legal contingent remainder, and the application of the rule against perpetuities is doubtful.¹⁰ If the statute does not execute the use the rule against perpetuities clearly applies. This distinction does not appear to be taken in the books.

Application of the Rule to the Interest of the Cestui Que Trust

374. All future equitable interests arising out of an express trust are subject to the rule against perpetuities if so limited that according to the rules of the common law the interests may vest beyond the period prescribed by the rule,¹ and it makes no difference what theory may be adopted as to the nature of the interest of the cestui que trust.² If the cestui que trust has an estate in the trust property, the rule prevents the vesting of that estate at a remote period. If the cestui que trust has merely a right to compel the trustee to perform the duty designated by the trust with respect to the trust res, the rule prevents him from acquiring, at a remote period, a vested right to require the performance of the duty. A limitation may be remote in equity which would not be remote at law. Thus, suppose the case of a devise to

⁶ For a discussion of this point, see §§91-97, ante.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §317.

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §317.

⁹ As to this, see §127, ante.

¹⁰ See §§364, 365, ante.

¹ See Gray, *Rule Perp.*, 2 ed. (1906), §§322, 323, 324; *Hillyard v. Miller*, 10 Pa. 326 (1849); *Lewis, Perp.*, p. 622 et seq., (1843).

² For a discussion of this point, see §§147, 148, 149, ante.

A. for life, and at his death to such of his children as reach twenty-five, and the case of a devise to trustees in trust to pay the rents to A. for life, and at his death, to convey to such of A.'s children as reach twenty-five. The limitation at law is not remote, as the remainder must become vested, if at all, at A.'s death, in such of his children as are then twenty-five.³ The limitation in trust is remote, as, there being no necessity for the equitable limitation to take effect as at law immediately on A.'s death, the vesting may be postponed until after A.'s death, and will consequently be remote, as all of A.'s children may not reach twenty-five within twenty-one years after his death.

Fallacy That the Rule Applies to the Trust

375. A trust is a relation. The rule against perpetuities does not affect the trust or apply to it in any way. The interest of each particular cestui que trust is considered by itself and stands or falls on its own merits. An interest invalid under the rule does not carry down with it the interest of any other cestui que trust unless the two are inseparable.⁴ The rule operates like a surgeon's knife,—it cuts out the offending limitations, nothing less and nothing more.⁵ This principle has been overlooked by the Supreme Court of Pennsylvania,⁶ and in this respect the rule has been applied with uncalled-for severity. The fallacy that the rule applies to the trust and not to the particular equitable limitations has frequently appeared,⁷ as has

³ Gray, *Rule Perp.*, 2 ed. (1906), §325.

⁴ For a discussion of this point see §463, post. There is a distinction between the operation of the rule and the application of the statute against accumulations. The statute saves that part of the direction to accumulate which is valid, and invalidates the remainder. See §643, post.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §§232, 412.

⁶ See §476, ante. This chapter should be read in connection with Chap. 19, discussing the cases where the future interests are invalid under the rule.

⁷ E. g., per curiam opinion Goehring's App., 81½ Pa. 283 (1875); Ashman, J., in Lakey's Est., 30 Pa. C. C. 287 at 288

(1904), where he said: "Although this trust manifestly violated the rule against perpetuities, it could be upheld as to the parties who were within the limits permitted by the rule." Potter, J., in the opening sentences of his opinion in Kountz's Est., No. 1, 213 Pa. 390 at 391 (1906), where he said: "The question in this case is whether the trust created by the will of the testatrix violates the rule against perpetuities." Mastresat, J., in Stephens v. Dayton, 220 Pa. 522 (1906), at 526, where the learned judge said: "This trust, therefore, does not offend against the rule against perpetuities," the reason assigned being that it would terminate at the expiration of a life in being at the decease of the tes-

also the fallacy that a perpetual trust violates the rule against perpetuities.⁸ It seems perfectly clear that the rule applies to the vesting of the particular equitable interests, and that the creation of the trust does not violate the rule against perpetuities in any way. If it violates anything, it violates the rule forbidding restraints on enjoyment.⁹

Clause Against Anticipation

376. Mr. Gray¹⁰ says that where the clause against anticipation is considered valid it may violate the rule against perpetuities. The clause is properly attached only to a married woman's trust¹ and can never violate the rule against perpetuities in Pennsylvania in the case of a trust for a married woman, because no sole and separate use is valid unless for a living cestui que trust, and in no case can it last longer than her life.²

Equitable Interests Implied by Law

377. A resulting equitable interest is not subject to the rule,³ because it is an interest arising by operation of law, and, consequently, not created by the donor of the trust.⁴ Furthermore, a resulting trust is a present interest and arises immediately upon the settlement by the donor. For the same reason a constructive trust is not subject to the rule. The court might raise a constructive trust at a period beyond

tator, upon which, it may be observed, that the rule against perpetuities has nothing to do with the time of the continuance of the trust. See also remarks of Penrose, J., in *Richardson's Est.*, 16 Phila. 326 at 327 (1884). See cases in next note.

⁸ E. g., *Briggs v. Davis*, 81½ Pa. 470 (1875); *Ashman, J.*, in *Cooper's Est.*, 9 Pa. C. C. 606 at 608 (1891); *Allison, J.*, in *Penna. Co. v. Price*, 7 Phila. 465 (1870).

⁹ See Chap. 22, on Trust of Absolute Interest. The word "trust" seems to have been used by many Pennsylvania judges as meaning the equitable interest of the cestui que trust, a loose and very inaccurate use of the term which may be responsible for the fallacy which ap-

pears in a number of cases, that the rule applies to the trust. As the trust is the equitable relation existing between the trustee and the cestui que trust and trust res, it is difficult to see how the rule applies. This loose use of the term is, perhaps, responsible for the unfortunate decision in *Johnston's Est.*, 185 Pa. 179 (1898); see §472, post.

¹⁰ *Restraints on Alien.*, 2 ed. (1895), §§272a-272g.

¹ See §§596, 597, post.

² See Chap. 24 on married women's trusts.

³ *Gray, Rule Perp.*, 2 ed. (1906), §327a.

⁴ See §380, post, as to non-application of the rule to interests arising by operation of law.

from the happening of the circumstances giving rise to the construction of the trust.

Destructible Interests

378. A future interest destructible by the owner of the preceding estate, it is said, is not within the rule against perpetuities.⁵ The subject is involved in some obscurity. Mr. Gray's position appears to amount to this: when the destructible interest violates the rule, the rule, nevertheless, does not apply, because the owner of the preceding estate can destroy the interest. Mr. Gray instances as illustrations of these interests, the cases of a limitation after an estate tail,⁶ a limitation under a general power of appointment,⁷ possibility of reverter after a conditional fee,⁸ and a power in a trustee.¹ The case of a limitation after an estate tail is obsolete in Pennsylvania.² The cases of a power in a trustee and a general power of appointment are discussed at another point,³ and the principle laid down that the question is as to the time from which the period prescribed by the rule against perpetuities begins to run. All of these cases, therefore, are to be explained on other grounds, at least so far as Pennsylvania law is concerned. The principle to be applied to a destructible interest is, it is apprehended, as follows: the holder of the estate can destroy the interest—he can give himself the fee—and then he can create the same interest again. Therefore, the interest exists by his sufferance and is considered as having been created by him. Consequently the period prescribed by the rule begins to run from the time he can destroy the interest. If judging from that time the interest is remote, then, of course, it is void because the holder cannot recreate it even if he gives himself the fee.⁴

Where the Interest Cannot Take Effect Apart From the Rule

379. If an interest cannot take effect because of the application of some other principle of law, the rule against per-

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §§203, 443, says that an interest which is at all times in the control of the present owner until it vests is, for every purpose of conveyance, a present estate. He gives no reason for his statement.

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §§203, 443.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §526b.

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §313.

¹ Gray, *Rule Perp.*, 2 ed. (1906), §490.

² See §23, ante.

³ See Chap. 17, on Powers.

⁴ This principle was misunderstood by the court in *Mifflins' App.*, 121 Pa. 205 (1888), stated §401, post.

that prescribed by the rule against perpetuities, measuring petuities does not apply. The interest in such a case is void, even if it must vest within the period prescribed by the rule, and it is apprehended that it is void under the other principle even if it may vest beyond the period. Thus, suppose the case of a gift to A. in fee, and when C. murders B., or any of his heirs, then to the eldest grandchild of X., a living person, and his heirs. The event here will happen, if it happens at all, within the period prescribed by the rule. It is, however, unlawful, and the interest limited to take effect thereon can never vest. If the same interest were limited to take effect upon a similar event at a period beyond that prescribed by the rule, it would, in like manner, be void, not under the rule against perpetuities, but because it would be unlawful apart from the rule. There may be an unlawful limitation upon a lawful event which may be void apart from the rule, such as a gift over on alienation by a tenant in fee.⁵ An alienation by a tenant in fee is a perfectly lawful and proper event. The limitation over upon that event is void because it tends to restrain the tenant from making the alienation, and the rule forbidding restraints on alienation prohibits such a limitation. As, therefore, the interest is void under another rule, it can never take effect at a remote period, and the rule against perpetuities will never have a chance to affect it.⁶

Interests Arising by Operation of Law

380. It has already been pointed out⁷ that the rule against perpetuities is aimed at the control of the dominion which an owner may exercise over his property. It, therefore, applies only to the interests created by the voluntary act of the party. The rule against perpetuities in like manner does not apply to an interest arising by operation of law, such, for instance, as dower, curtesy, escheat, and resulting trust.

⁵ Such a gift was said to be too remote in the case of the Appeal of St. Luke's Church, 1 Walker, 283 (1863). While the event was remote, it is submitted that the gift over was void first, apart from the rule.

⁶ See also §338, ante, on the distinction between the rule against perpetuities and the rule forbidding restraints on alienation.

⁷ See §§1-5, ante.

Interests Arising by Contract

381. An interest arising out of a contract is not within the scope of this book, which discusses solely the cases of gifts of property. Mr. Gray instances several cases⁸ of rights arising by contract, and discusses the application of the rule against perpetuities to them. It is apprehended, although with some hesitation, that the rule against perpetuities is not properly applicable to any of these cases. It is a rule which has been evolved solely to restrain the exercise of the power of dominion in making gifts.

Summary of the Law as to Interests Subject to the Rule Against Perpetuities

382. The rule against perpetuities prevents an interest from vesting at a remote period. Consequently an interest which is vested or must vest within the period prescribed by the rule, does not come within its destroying effect. A vested legal remainder¹ and a reversion² are such interests. It is doubtful whether a contingent legal remainder which is limited upon a preceding estate which may not terminate until a remote period, is subject to the rule.³ There is no question that the rule applies to future legal interests in a chattel real when created by will,⁴ but it is doubtful whether it applies to a future legal interest in chattels personal when created by will.⁵ It is uncertain whether a future legal interest in either a chattel real or a chattel personal can be created by deed inter vivos in Pennsylvania.⁶ It cannot be known, therefore, whether such an interest, if it can be created, is subject to the rule.⁷ Easements,⁸ rights of entry for condition broken,⁹ possibilities of reverter¹⁰ and executory devises¹¹ are plainly subject to the application of the rule. In like manner, all equitable interests, such as shifting and springing uses¹² and the interest of the cestui que trust,¹³ are subject to the rule; but an equitable interest implied by law is not subject.¹⁴

⁸ Gray, *Rule Perp.*, 2 ed. (1906), a covenant for renewal of lease, §230; mortgages, Chap. XVI.; pledges, §571a.

¹ See §362, ante.

² See §361, ante.

³ See §§364, 365, ante.

⁴ See §366, ante.

⁵ See §369, ante.

⁶ See §§92-95, ante.

⁷ See §369, ante.

⁸ See §366, ante.

⁹ See §367, ante.

¹⁰ See §368, ante.

¹¹ See §370, ante.

¹² See §373, ante.

¹³ See §374, ante.

¹⁴ See §377, ante.

Interests arising by operation of law,¹ those arising out of contract,² and destructible interests³ are, in like manner, exempt from the rule against perpetuities. Where the interest cannot take effect apart from the rule, although it is void, it is not void under the rule against perpetuities.⁴

¹ See §380, ante.

³ See §378, ante.

² See §381, ante.

⁴ See §379, ante.

CHAPTER 17

POWERS AND THE RULE AGAINST PERPETUITIES

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The Rule Applies to the Future Interests and Not to the Power

386. The rule against perpetuities has for its object the destruction of future interests which may vest at a remote period.¹ The rule, therefore, does not apply to a power, but it applies, if it applies at all, to the future interest limited under the power. There is nothing in the terms of the rule, whichever way it is stated,² or in its history,³ to warrant the notion that it has anything to do with the validity or operation of a power of any kind. The questions to be considered are: (1) Is the power valid, i. e., can it be lawfully exercised? (2) If it can, has it been exercised according to its terms, and are the limitations thereunder such as are thereby authorized? (3) If these two questions are answered in the affirmative, can the limitations take effect? The rule against perpetuities is involved in the answer to the third question only. The answers to the first and second are to be found in the law of powers. The rule, therefore, has no concern with the circumstance that the power may be exercised at any future period, whether remote or not. It has never been supposed that the rule applied, for instance, to the birth of the great-grandchild of the testator, or to the return of B. from Rome, although it may apply to the interests limited to take effect on the happening of those events. How then can it be said that the rule applies to the power?⁴ It appears, therefore, that the rule against perpetuities touches powers only in so far as the interests limited under them may violate the rule.

¹ See §§332, 333, ante.

² See §§328, 329, ante.

³ See §326, ante.

⁴ It is submitted, therefore, that Mr. Gray's language in several instances, e. g., Rule Perp., 2 ed. (1906), §§473, 475, 476, 535, when he speaks of a power as being

void because remote, overlooks the precise point involved. It is, of course, true that as the rule destroys the interest limited under the power, it produces the practical consequence that the power is nugatory. If the power is exercised and an attempted limitation made, the per-

This principle, which is of the utmost importance, cannot be too clearly borne in mind, although it has been generally overlooked in the books. The only difficulty is in fixing the date from which the period prescribed by the rule begins to run, whether from the time of the exercise of the power or from some prior time.

Division of Powers

387. For the purposes of this discussion powers may be divided into (a) powers of appointment⁵ which may be general or special; (b) powers in trust;⁶ (c) powers in a trustee,⁷ and (d) powers of revocation.⁸ The application of the rule against perpetuities to the interests limited under these powers will be discussed with reference to each of the headings in the order named.

Preliminary Discussion of Powers of Appointment

388. Powers of appointment are of two kinds: (1) a special power of appointment, which is where the donee of the power can appoint only to particular persons or classes of persons,⁹ and (2) a general power of appointment, which is where he can appoint to any person or in any way.¹⁰ It will be necessary, in order to understand the application of the rule against perpetuities, to consider special and general powers of appointment separately.

General Application of the Rule to Limitations Under a Special Power of Appointment

389. The rule applies to the interests limited under the power, if they may vest at a remote period.¹ The period

son specified has no title; not, however, because the power is bad, but because the rule against perpetuities prevents him from taking the gift.

⁵ Discussed §§388-401, post.

⁶ Discussed §§402-409, post.

⁷ Discussed §§410-436, post.

⁸ Discussed §437, post.

⁹ Thus, where there is a devise to A. for life, and at his death to such persons as he shall by will appoint, there is a special power of appointment appendant. Where

there is a devise to A. for life, and at his death to B. and his heirs, or to such persons as C. shall by his will appoint, there is a special naked power of appointment. The latter is a rare case; for an illustration, see *Ingersoll's Est.*, 167 Pa. 536 (1895).

¹⁰ Thus, where there is a devise to A. for life, and after his death to such persons as he may appoint by deed or will, there is a general power of appointment.

¹ See §386, ante.

prescribed by the rule begins to run from the date of the creation of the interest.² The limitations under a special power of appointment are to be considered as created by the donor of the power; consequently the period prescribed by the rule begins to run from the date of the creation of the power, or, as is commonly stated, the remoteness of a limitation under a special power of appointment depends on its distance in time from the creation of the power and not from the time of the exercise thereof. The rule against perpetuities is to be applied to the limitations in question as if they were the actual limitations of the donor of the power. The law as to this is clear and well-settled both in England and in Pennsylvania.³ The application of the rule calls for a distinction between (1) limitations under a power exercisable at a remote period; (2) limitations under a power exercisable only within the period prescribed by the rule computing the period in each case from the time of the creation of the power.

² See §342, ante.

³ The reasons are not so plain. Mr. Gray, *Rule Perp.*, 2 ed. (1906), §514, gives as a reason that if this were not so, each tenant for life might appoint for life, and an indefinite series of life estates be created, and thus the very evil at which the rule is aimed, would exist. It is submitted, however, that this is simply saying that the exercise of the power does create a remote estate, whereas, the question is whether the limitation is remote, and does not, therefore, solve the problem. Mr. Lewis, *Perp.*, Chap. XX., p. 482 (1843), says it is because "the maxim *quod facit per alium facit per se* necessarily implies that that which it is not allowable for an individual to do himself, must be equally improper when effected in the person of another." Consequently, a remote limitation is equally objectionable when made by another to whom has been entrusted a power of appointment not commensurate with the entire ownership of the property. This reason does not go far enough. It does not explain why the maxim *quod facit* applies. It is submitted that the maxim applies because the tenant of the particular es-

tate is enabled to do something not incident to his estate, and his capacity to so act depends on the power, not on his title; consequently, he is doing something on the authority of another person in right of that person, and not in his own right. The act, therefore, of the donee of the power is considered very properly as the act of the donor of the power. The case is really that of a gift to a person unascertained, and that ascertainment is left to the discretion of the donee of the power. That this is so appears from the wording of all powers, e. g., to A. for life, and after his death to such persons as he shall by will appoint. The limitation here is directly to the persons to be appointed by A., and they become certain immediately upon his death having exercised the power. The case, therefore, comes squarely within the wording of the rule, because the future interest is limited at the time of the creation of the interest to such persons as shall be ascertained, the limitations under which ascertainment must vest within life or lives, etc., from the time of the creation of the power under which they are to be ascertained.

Application of Rule to Limitation Under a Special Power of Appointment Exercisable at a Remote Period

390. It is clear that the exercise of the power is a condition precedent to the taking effect of the limitation thereunder, and, therefore, if the power may be exercised at a remote period, there is a possibility that the limitations will take effect at a period beyond that prescribed by the rule. The rule applies and the limitations are void.⁴ The limitations under the power, even if exercised, and valid appointments made,⁵ can never take effect.⁶ The power may be exercised in so far as the rule against perpetuities is concerned, but will be exercised in vain.⁷

Application of Rule to Limitations Under a Special Power of Appointment Exercisable Only Within the Period Prescribed by the Rule

391. Suppose the power of appointment is so limited that it must be exercised, if at all, within the period prescribed by the rule against perpetuities.⁸ The remoteness of the interest limited under such a power is determined by making the

⁴ Dictum, Stewart, P. J., in the court below, affirmed on appeal in *Johnston's Estate*, 185 Pa. 179 at 189 (1898); Gray, *Rule Perp.*, 2 ed. (1906), §§475, 476.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §476.

⁶ No Pennsylvania case of a power of appointment which can be exercised at a remote period, has been found. An example will illustrate the point: to A. for life, and at his death to the first son of B., a living bachelor, for his life, and at the death of the son of B., to such persons as the son shall by will appoint. B. marries, and has a son, X. A. dies, X. takes the life estate, which is valid. The power of appointment may be exercised at a remote period if X. lives more than twenty-one years after the death of his father. Mr. Gray, *Rule Perp.*, 2 ed. (1906), §476, puts this case as an example of such a power; a power to A. to appoint to all his grandchildren who are living twenty-five years after his death. He says such a power is bad. The power,

however, cannot be exercised at a remote period because it must be exercised by A. The necessary limitations under it, however, are remote because the donor of the power, by specifying the interest which can be created, has made it impossible for the donee to make any valid appointment. The case, therefore, is that of a special power, limited to be exercised in time, under which an invalid appointment must necessarily be made.

⁷ The inaccuracy of the notion that the power is void under the rule has already been pointed out; see §386, ante.

⁸ A power, although unlimited as to time, is considered as exercisable within the period if it must be exercised within a reasonable time, and that reasonable time does not extend beyond the period prescribed by the rule; Gray, *Rule Perp.*, 2 ed. (1906), §478. This is nothing but a limitation of the time of the exercise of the power by construction.

period prescribed run from the time of the creation of the power, and the possibility of the contingency happening without that period depend on the facts as they exist at the time of the exercise of the power. Thus, if there is a gift by will to A. for life, with power to appoint among the great-grandchildren of the testator, and at the time A. dies all the children and grandchildren of the testator are dead, an appointment by him to the great-grandchildren would be valid because the class would then be closed, and no one could take at a remote period.⁹ If, however, at the time of the death of A. there were grandchildren of the testator still living, the same appointment by him would be void, and a similar appointment in either case by the testator would violate the rule.¹⁰ The donee of the power, therefore, may make limitations which could not have been made by the donor of the power.¹¹

Consequences of Invalidity of Limitation Under a Special Power of Appointment. Preliminary Discussion

392. It will now be in order to ascertain what disposition is to be made of the property embraced in the limitations under a power which are void and the effect of such invalidity on the preceding estate. As to the latter, it may be said that the invalidity of the limitations, possible or actual, can

⁹ See §445, post.

¹⁰ Gray, Rule Perp., 2 ed. (1906), §523e. The principle, discussed §335, ante, that the rule destroys any limitation which may take effect at a remote period, even though it takes effect in time, does not apply.

¹¹ (a) Where the power is so drawn that it authorizes an appointment only to issue born in time, and the donor undertakes to enlarge the class, thereby embracing persons who cannot be ascertained in time, the gifts cannot be separated and the whole limitation will be void; Gray, Rule Perp., 2 ed. (1906), §538. (b) And the appointment is not helped by the fact that it turns out that the class cannot exceed the number of those properly within the terms of the power; Gray, ubi supra §539. (c) Suppose there is a power of appointment, under which the

appointment is to take effect within a certain time which is not remote. If it takes effect beyond that time, the appointment is void under the law of powers, consequently if the donee appoints on a contingency which may happen at a remote period, the appointment will nevertheless be good, if the contingency does happen within the original time fixed. The interest can never come within the destroying effect of the rule against perpetuities operating in the forbidden period, because it would first come into collision with the principles of the law of powers, and never have the chance to take effect as a remote interest; Gray, ubi supra, §540; see §379, ante. (d) Where there are two powers, one of which is void, they fall together unless they are clearly separable; Gray, ubi supra, §479.

have no effect on the estate of the donee of the power.¹ If the subject matter is personalty, and the gift by deed, we have the preliminary question whether future legal limitations of personalty can be created by a deed *inter vivos*.² No case of a legal limitation of a future interest in personalty under a power by deed *inter vivos* has been found and, therefore, no statement can be ventured as to the law on this point. In considering the disposition of the property we may distinguish two cases: (1) where the power can be exercised at a remote period, (2) where the power must be exercised in time.

Invalidity of Limitations Under a Power Exercisable at a Remote Period

393. When the power is exercisable at a remote period the limitations will be entirely void. The power will be nugatory under the law of powers, and as it can never be exercised with any legal effect, it will be considered as if omitted from the instrument, and the property disposed of as in any case of default of appointment. The questions raised by such a case are, however, properly solved only by the application of the law of powers, and do not come within the scope of a discussion of the rule against perpetuities.³

Where the Power Must be Exercised in Time and Limitations Thereunder are Void

394. Where the power must be exercised in time, and the limitations thereunder are invalid, the case is somewhat different. The power of appointment has been exercised, and the only difficulty is that the limitations thereunder are invalid. The property so appointed should be disposed of under the principle already discussed,⁴ just as if the invalid limitation had been made by the donor of the power. The principles governing this are pointed out in Chapter 19, except that where there is no residuary bequest or the power is to appoint the

¹ See §§465, 467, 470, *post*. See also comments in §401, *post*.

² Discussed §§92 and 95 *ante*.

³ Gray, *Rule Perp.*, 2 ed. (1906), §535. No Pennsylvania case on this point has been found. Mr. Gray says that

where the power itself is remote, the limitations in default of appointment being vested, take effect as if the power had been omitted.

⁴ That the limitations are those of the donor of the power; see §389, *ante*.

residue, the property goes as provided in default of appointment, instead of under the intestate laws or by way of resulting trust.⁵ Where the preceding valid limitations under the power exhaust the fee, it is probable that the subsequent invalid limitations drop and the preceding ones remain.⁶ If the limitations are separable, the invalid ones are destroyed and the others remain.⁷ If they are inseparable, they all fall together. The Pennsylvania cases relating to special powers of appointment will now be considered in chronological order.

Smith's Appeal

395. In *Smith's Appeal*⁸ there was a gift of the residue in trust as to a portion thereof for a daughter for life, upon her death to such persons as she should by will appoint, with limitation over in default of appointment to the child or children of said daughter. The daughter died, having made a will whereby she gave her individual estate and that as to which she had a power to appoint, to her sons and daughters for life, and after their death, to the uses of their last wills, with limitations over in default of appointment. All the children of the daughter were born in the lifetime of the father. The question came up at the audit of the account of the trustees under the father's will. It was held that the limitations under the power of appointment were wholly void, and the estate distributed under the original will, as in default of appointment.⁹ The Supreme Court, in an opinion by Paxson, J., said that that portion of the daughter's will which was in exercise of the power, should be written into the will of her father, and the two regarded as one instrument; and that when so regarded there would be a gift to the daughter for life, and then to her sons and daughters for life, with remainder

⁵ *Smith's App.*, 88 Pa. 492 (1879), stated §395, post; *Boyd's Est.*, (1) 199 Pa. 487 (1901) stated §398, post; *Gray, Rule Perp.*, 2 ed. (1906), §§533, 534. It is important to bear in mind that the property embraced in the void limitations is to be disposed of as of the estate of the donor, and not of the estate of the donee, in this case differing from the case where the limitations under the power are valid but cannot take effect; see *Linton's Est.*, 198 Pa. 438 (1901).

⁶ *Gray, Rule Perp.*, 2 ed. (1906), §534, n. 5.

⁷ *Gray, Rule Perp.*, 2 ed. (1906), §531. See *Boyd's Est.*, (1) 199 Pa. 487 (1901), stated §398, post; and see *Smith's App.*, 88 Pa. 492 (1879), stated §395, post; as to separability see §§337, ante, 463, post.

⁸ 88 Pa. 492 (1879).

⁹ As to this point, see §394, ante, and *Gray, Rule Perp.*, 2 ed. (1906), §239, n. 4, 3rd paragraph.

to their appointees, which gift would clearly be bad because it included children born after the death of the donor of the power. This case has been pretty well discredited and overruled, and the decision was clearly erroneous.¹ It is important, however, to point out to the student the particulars in which the court misapprehended the rule against perpetuities, as the mistake made by the court is one of frequent occurrence. The limitations under the power to the children were plainly good, as they must all necessarily have been ascertained before the death of the daughter, who was born at the date of the death of the donor of the power. In like manner, as all the children were in fact born before the death of the donor, the limitations over by the daughter after their death were good. Judging by the facts existing at the time of the exercise of the power, it was plain that the limitations over were good.² If these limitations had been made by the donor, they would have been void, as it could not have been told at his death whether the daughter would have children born afterward or not. As the limitations over by the daughter were after the several and respective deaths of the children, they were clearly separable and would therefore be good as to those born before the donor's death, and void as to those born after.³ The court was probably influenced by the doctrine advanced by Mr. Lewis,⁴ that an appointment under a power is bad if made to a person unborn at the time of the creation of the power, although living at the date of appointment, and specifically named in it.⁵ The rule against perpetuities has to do with the time of vesting, and not with the question when the party who is to take is born.⁶

Lawrence's Estate

396. In *Lawrence's Estate*⁷ a father gave his estate in trust for his daughter Ann for life, and upon her decease, for the appointees of her will. Ann died, having exercised

¹ See *Boyd's Est.*, 199 Pa. 487 (1901), stated §398, post.

² *Gray, Rule Perp.*, 2 ed. (1906), §239, n. 4, §523e.

³ *Gray, Rule Perp.*, 2 ed. (1906), §395; as to separability see §§337, ante, 463, post.

⁴ *Lewis, Perp.*, pp. 491, 492 (1843).

⁵ See a discussion of this fallacy, *Gray, Rule Perp.*, 2 ed. (1906), §§517-523b; see 6 L. R. A. N. S. n. 330.

⁶ *Weinbrenner's Est.*, 173 Pa. 440 (1896); see language of *Ashman, J.*, at 443.

⁷ 136 Pa. 354 (1890); see note on this case, 11 L. R. A. 85.

the power, thereby appointing to her executors in trust to pay certain annuities to her children and grandchildren for life, the trust to terminate upon the death of her last surviving child, and then to pay over the principal to a charity. All of Ann's children were living at the death of her father. The parties entitled under the will of the father, in default of the appointment by the daughter, claimed to have the whole estate transferred to them on the ground that the appointment was void. It further appeared that at the death of the daughter the estate consisted solely of real estate. The Supreme Court affirmed the decree of the Orphans' Court.⁸ Mr. Justice Clark, in the Supreme Court, said that the appointment was valid, as it was to persons who would be in esse at the time of Ann's death; that the appointment was not affected if the limitations over to the charity were void, as where there was a particular estate and remainder, and the particular estate good and the remainder void, the remainder only was cut out.⁹ He then concluded that the remainder to the charity was vested, and consequently did not violate the rule, and that the appointment was not invalid because a trust was superimposed upon the estate which was limited. The learned judge said, "In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property."¹⁰ The decision is sound. The questions of the validity of the trust and the limitation over to the charity were not before the court.¹ This case overrules *Smith's Appeal*,² in so far as the latter would invalidate the limitations under the power to the children born in the lifetime of the donor of the power.

⁸ The office of trustee, under the will of the daughter, being vacant, and the account of the trustee under the will of the father being before the court for settlement, a petition was presented by the appointees under the will of the daughter asking for the removal of the then trustee, and the appointment of a new trustee under the will of the father, in accordance with the appointment under the will of the daughter. The decree of the Orphans' Court, which was affirmed, appointed a

trustee under the will of the daughter, and directed a conveyance to that trustee by the trustee under the will of the father.

⁹ See §465, post.

¹⁰ At 367; the effect of the trust would be to restrain the enjoyment, and would not violate the rule against perpetuities in any respect; see Chap. 22.

¹ As to the application of the rule to gift to charities, see §§726, 730, post.

² 88 Pa. 492 (1870), stated §395, ante.

Ronckendorff's Estate.

397. In Ronckendorff's Estate³ the testator gave one-third of his estate in trust to his daughter for life with power of appointment. The daughter died, having appointed to her husband for life, after his death to her son George for life, with remainder in fee to his issue, and, in default of issue, to her sister. The husband died, leaving George, who was born after his grandfather's death, surviving. The question before the court appears to have been as to the validity of the appointment to George. Ashman, J., said that the limitation was valid, that reading the two wills together, the limitation was to the daughter for life, then to the husband for life, then to the son for life. The report does not disclose whether the husband was born before the death of the testator or not. If he was born afterward the limitation to George was void, because upon the facts as they existed at the time of the exercise of the power, there would be a possibility that he would take at a remote period.⁴ If George had been born in the lifetime of the testator, the husband being born afterward, the limitation to him would be valid because he would take, if he took at all, within the period prescribed by the rule. The estate for the life of the son extended into the remote period, but was nevertheless valid.⁵ The limitations over after his decease were clearly invalid.

Boyd's Estate

398. In Boyd's Estate, No. 1,⁶ there was a gift in trust for a daughter, Mary, for life, with power of appointment by will and, in default of appointment, to her heirs. Mary died, having appointed to a trustee in trust to pay the income to her son for life, and \$25,000 of the principal to him absolutely upon arriving at the age of twenty-five years, the remainder at his death in trust for his widow and children, if any, as he should appoint, and, in default of appointment, to the persons entitled under the intestate laws had he died seised and possessed thereof intestate, and if he should leave a widow and no children, one-third to the widow, unless he

³ 11 Pa. C. C. 447 (1892).

⁴ The exercise of the power is to be judged by the facts existing at the time of the exercise, making the period pre-

scribed by the rule run from the time of the creation; see §391, ante.

⁵ See §345, ante.

⁶ 199 Pa. 487 (1901).

should otherwise direct by will, and if he should otherwise direct certain legacies to charities and one-half of the residue to the daughter's husband, and the other half to the children of her brother who were designated in the will, in equal shares.⁷ The son died without children or issue, leaving a widow to whom he bequeathed his entire estate. The report is not clear as to how the case came up. The decision of the court in banc, sustaining exceptions to the adjudication, was affirmed on appeal by the Supreme Court. Penrose, J., in delivering the opinion in the court below said that the life estate to the son and the gift to him of \$25,000 upon attaining the age of twenty-five years, if that event occurred in time, was valid;⁸ that the appointment to the widow and unborn children of the son was bad;⁹ and that the property passing under the void limitation was to be distributed to the heirs of the daughter, as provided in the father's will, there being, to that extent, a failure to make a valid appointment;¹⁰ and that the ulterior limitations to the children of the brother were contingent and consequently void, but if they vested, they would be saved from the operation of the rule.¹ This is the latest and leading case on the subject, and it illustrates almost every point arising under the application of the rule to interests limited under special powers of appointment which must be exercised in time. The decision may be considered as overruling the cases and dicta cited in the note,² and as deciding, although the point was

⁷ The last clause is to be found only in the opinion of Penrose, J., in the court in banc. The case is badly reported, and the limitations in the will have to be picked out from the various parts of the report.

⁸ This is an illustration of the principle that the donee of the power may make an appointment which would be invalid if made by the donor. Had the original testator appointed to the son upon attaining twenty-five, it would unquestionably have been void, as he might have attained twenty-five more than twenty-one years after his mother's death. It was, of course, certain when his mother died, whether he would attain twenty-five, if ever, within twenty-one years after her death. The report does not

state how old the son was when his mother died. If he was, in point of fact, over four years old at his mother's death, the limitation of the \$25,000 to him would not violate the rule.

⁹ This is clear. Mary being unmarried at the death of the donor of the power, her son was born after his death. The limitation, therefore, after the death of the son would be remote, because after the termination of a life not in being at the creation of the interest.

¹⁰ See §394, ante, as to effect of invalid limitations under a power exercisable in time.

¹ See §464, post.

² Smith's App., 88 Pa. 492 (1879), stated §395; Gardette's Est., 13 W. N. C. 315 (1883), s. c. 16 Phila. 264; dicta,

not raised, the principle³ that the same rule applies to a general power to appoint by will, as applies to any other kind of a special power.

*Summary of the Law as to the Application of the Rule Against
Perpetuities to Interests Limited Under a Special
Power of Appointment*

399. While the underlying reasons may be the subject of some controversy, the law as to this part of the subject is perfectly plain and well settled. The period prescribed by the rule begins to run from the date of the creation of the power,⁴ consequently the remoteness of the interest limited under the power is to be determined by its distance in time from the date of the creation of the power, and not from the time of the exercise, and the rule is the same where there is a general power to appoint by will only, as in the case of any other special power of appointment. If the power is exercisable at a remote period, all limitations thereunder will be void under the rule, even though the power is, in point of fact, exercised in time or the interests limited thereunder are not remote.⁵ If the power must be exercised within the period prescribed by the rule, the limitations thereunder will be valid or not, according as they will take effect within or without the period.⁶ The rule does not apply unless the limitations are remote, and the remoteness of the interest is to be predicated on the facts as they exist at the time of the exercise of the power and not at the time of the creation,⁷ and it may be proper to add that the life tenant may, under a power exercisable within the period, appoint to persons unborn at the date of the death of the donor of the power, if the gift takes effect at the death of the life tenant or within twenty-one years thereafter.⁸ The doubt which Mr. Lewis raises as to this proposition does not obtain in Pennsylvania.⁹ It will thus appear that the possibility that the limitations may take effect at a remote period,

Hare, P. J., in the court below at 214, and Green, J., in the Supreme Court at 221, in *Mifflin's App.*, 121 Pa. 205 (1888), stated §401, post.

³ Discussed by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §§526, 526a.

⁴ See §389, ante.

⁵ See §390, ante.

⁶ See §391, ante.

⁷ See §391, ante.

⁸ See note 6 L. R. A. N. S. 330.

⁹ Mr. Gray lays down three rules as follows: (1) If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. (2) A power which cannot be exercised beyond the limits of the rule against perpetuities,

in the case where the power of appointment may be exercised at a period beyond that prescribed by the rule, completely destroys them, even if the limitations are, in point of fact, not remote; whereas, when the power of appointment must necessarily be exercised in time, the possibility that the interest limited thereunder may be remote is immaterial.

Application of the Rule to Limitations Under a General Power of Appointment

400. The case of a general power of appointment stands on a somewhat different footing. Where the power conferred on the life tenant is a general power to appoint by deed or will, it is plain that he can, in his lifetime, appoint by deed to himself in fee, or to some one who will convey back to him, and he will thus become seised of an absolute interest without reference to the former state of the title.¹⁰ Since he can do this he is practically the owner of the fee. The law considers that as done which he might do, and that the appointment which he does in fact make is an appointment in his own right as owner of the fee. The limitations under the power are consequently created by the donee of the power, and the period prescribed by the rule begins to run from the time of the exercise of the power and not from the time of its creation.¹ There is only one case in Pennsylvania in which a general power of appointment has been before the court in this connection. That case will now be discussed.

is not rendered bad by the fact that within its terms an appointment could be made which would be remote. (3) The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power; Rule Perp., 2 ed. (1906), §473. These remarks are not limited to special powers of appointment, although it is conceived that to be strictly accurate they should be so limited. It is submitted further, that the first rule embodies the erroneous notion that the rule applies to the power, whereas, it is apprehended that it applies to the limitations under the power; as to which, see §386, ante.

¹⁰ He may acquire the fee by the exercise of the power; Sugden on Powers, 8 ed. (1861), p. 394; see also Evans' Est., 27 Pa. C. C. 628 (1902).

¹ Gray, Rule Perp., 2 ed. (1906), §§524-526b; Lewis, Perp., pp. 483, 484, (1843). The law in Pennsylvania is the same; dictum, Sergeant, J., in Thompson v. Garwood, 3 Whart. 287 at 306 (1838). Miffin's App., 121 Pa. 205 (1888), stated §401, post. Mr. Gray, ubi supra, §§524-526b, puts this on the ground that the donee of the power is practically the owner, and that as the rule is a practical rule, it would be an undue observance of form to say that in such a case

Mifflin's Appeal

401. In *Mifflin's Appeal*² the facts are somewhat obscure as the case is imperfectly reported. It seems that an equitable life tenant had a general power of appointment which she did not exercise in her lifetime. She left a will making appointments which, if the period prescribed by the rule began to run from the date of the death of the donor of the power, would be void, but if the period began to run from the date of the death of the donee of the power, that is, the date of the exercise of the power, would be valid. The court held that the limitations were valid, and that the period began to run from the date of the exercise of the power. The decision is unquestionably correct. The language of the court is open to some objection and is not quite clear. Hare, P. J., in the court below, said that a perpetuity was an indestructible interest incapable of alienation, and that the life estate was not such an interest because the life tenant under the general power to appoint by deed or will could destroy her life estate and give herself a fee, and she was therefore not within the rule against perpetuities. The learned judge probably had in mind the thought that a perpetuity was an estate tied up for a remote period, but that such circumstances were not present in the case at bar because the life tenant could, by the exercise of the general power, destroy the limitations made by the donor of the power. In this the learned judge was deceived by an erroneous notion of a perpetuity,³ and overlooked the

the limitations to him must be considered as if they were life estates only. Mr. Lewis, *Perp.*, pp. 483, 484 (1843), puts it on the ground that as the great end of the laws against remoteness is to secure the immediate alienability of property, there is no object in applying the rule to a general power of appointment, as the donee has already, by virtue of the power, unlimited power of alienation, as such general power practically gives the donee a new fee. So also the limitations under a general power of appointment to the unborn child of a living person are valid unless the condition precedent to the exercise of the power is an event which may be remote; see dictum Clark, J., in *Lawrence's Est.*, 136 Pa. 354 at 364 (1890).

Gray, Rule Perp., 2 ed. (1906), §477; *Hinkle v. Rehm*, 16 Super. Ct. 470 (1901). Since a general power to appoint by deed includes a power to appoint by will, the same reasoning would follow in a case where the power was exercisable by deed only. No case as to this has been found in Pennsylvania. The circumstance that the life tenant has not in point of fact exercised the general power of appointment in his lifetime, is immaterial. This distinction was relied on by the learned Master in the court below in *Mifflin's App.*, 121 Pa. 205, see 216 (1888), stated §401, post, and repudiated by the court.

² 121 Pa. 205 (1888).

³ Discussed §330, ante.

principle that the rule applies, if at all, to the limitations under the power and not to the estate of the life tenant. Furthermore, under the reasoning of the learned judge, it would be necessary for the life tenant to actually exercise the power of appointment and destroy the supposed offending limitations made by the donor of the power, whereas, it was decided that no such actual exercise was necessary. In the Supreme Court Mr. Justice Green⁴ said that the question was whether the provisions of the original deeds were inoperative because of the rule against perpetuities, and that they were inoperative if they created inalienable and indestructible estates to continue longer than the prohibited period.⁵ This also was objectionable, as the rule has nothing to do with the continuation of an estate, but with the time of its vesting, and no possible question arose as to the limitations by the donor of the power, which were admittedly valid. The sole question was whether the limitations made by the donee of the power were remote.⁶

Definition of a Power in Trust

402. When a power is to be exercised for the benefit of some one who is or will become absolutely entitled to the proceeds of the exercise of the power, and the power has no other object, there is a power in trust, so called because the party entitled can have the assistance of a court of equity to control the exercise of the power.⁷

Application of the Rule Against Perpetuities to a Power in Trust

403. A power in trust is a direction to dispose of the property in the manner specified, and the interests taking effect under the power are directly created by the donor. The period prescribed by the rule begins to run, therefore, from the date of the creation of the power. This is so clear that it has never been questioned, and this part of the subject

⁴ On p. 224.

⁵ It is apprehended that the use of the phrase prohibited period is somewhat confusing. Properly speaking, the prohibited period is the period beyond that prescribed by the rule, whereas, the learned

judge evidently used it as meaning the period prescribed by the rule.

⁶ See note on this case, 1 L. R. A. 451.

⁷ As to the distinction between powers in trust and powers in a trustee, see §410, n. 2, post.

presents little difficulty. The ordinary case of such a power is a power of sale. If the limitations are such that the interests of the donees in the proceeds take effect at a remote period, they are void; consequently the power out of which they are to arise has no other reason for existence and becomes useless. A court of equity will not permit the person who is to exercise it to proceed in the matter because to do so would assist him in the creation of a perpetuity. It is not the power that is remote, but the interest limited to take effect upon the exercise of the power. Where the person or persons entitled to the proceeds take an immediate vested interest therein or an interest which vests or must vest within the period prescribed by the rule, the limitations are obviously valid,¹ and the person or persons entitled, or all of them if more than one, can permit the property to remain unsold for such period as they may see fit. If they do so the circumstances presented do not call for the application of the rule against perpetuities. They can, however, at any time, with the assistance of a court of equity, compel a sale. It will be observed that the power of the parties entitled to compel an exercise is the result of the validity of the limitations, and not the validity of the limitations the result of the power to compel.² The most common instance of this kind of power is a power to sell for paying debts and legacies. The debtors and legatees take an immediate vested interest in the proceeds.³ There is one case in Pennsylvania illustrating this application of the rule, which will be discussed in the next section.

Dawson v. Lancaster

404. In *Dawson v. Lancaster*⁴ the testator made sundry specific devises of real estate to certain children for life, naming them, with a proviso in each case that in the event of their death without issue the premises devised should form part of his residuary estate, and, in a subsequent clause, directed his executors to sell his residuary estate whenever they should think best, and, whenever sold, to divide the proceeds among his children named, and the issue of such as

¹ *Brisben's App.*, 70 Pa. 405 (1872);
Severns's Est., 211 Pa. 68 (1905).

² *Gray, Rule Perp.*, 2 ed. (1906), §486.

³ 28 Pa. C. C. 657 (1903).

⁴ *Gray, Rule Perp.*, 2 ed. (1906),
§§486-509j.

should be deceased, share and share alike. One of the children, a son, Thomas, died without issue. A bill in partition was filed by the other children, claiming that the residuary devise was void because it violated the rule against perpetuities, and that consequently the testator died intestate as to the remainder devised. The court, in an opinion by Ralston, J., found in accordance with the prayer of the bill. The learned judge said that the power to sell was "to be exercised at such time as, in the opinion of the executors, the same shall be for the best interests of the estate,"⁵ which might possibly be at a remote period, and the persons entitled to the proceeds could not be ascertained until the sale took place. He, therefore, concluded that there was no one entitled to apply to compel an exercise of the power merely for the purpose of making valid an estate which otherwise would be invalid. It is assumed that the learned judge meant valid under the rule against perpetuities. Upon this reasoning, it is to be observed, first, that the Orphans' Court could not possibly, by any act, make valid a limitation which is void under the rule; secondly, that the fact that there was no one to proceed to enforce the sale was the result of the invalidity of the limitations, and that, therefore, the question of how far a court of equity can proceed in directing such a sale, was totally immaterial in reaching a conclusion as to the validity of the limitations. The limitations were invalid because, under the construction put upon the power of the sale, they might become vested at a remote period. This was a power in the nature of a trust, and upon the construction adopted by the court the interests in the proceeds were not ascertained, nor were they to be ascertained at any fixed period; consequently they were remote. The power, therefore, had no reason for its existence and was useless. The residuary devise thereof fell, as that was its sole purpose, and as there was no specific devise of the legal title to the trustees for the purposes of the sale, the title remained in the specific devisee for life, and after his death remained undisposed of and went to the heirs under the intestate laws.

Direction to Sell With no Disposition of the Proceeds

405. When there is a direction to sell, without any disposition of the proceeds, the proceeds belong to the party

⁵ While this construction of the will of the case is offered on that point. is open to some objection, no criticism

entitled to the fee. Consequently the power is merely something which he can do himself, and amounts to a restraint on his enjoyment of the property, and does not violate the rule against perpetuities at all, as the rule applies only to the limitations under the power.⁷

Powers in an Executor

406. An executor is one appointed to the office of executing a man's last will and testament, and in strictness the executor has to do only with personalty. A will relates to lands, and a testament relates to personal property, and if a person is named as trustee, he must be so specifically designated in the will. A will, furthermore, is a mere devise of real estate and needs no executor; consequently a power of sale contained in a will is a common law power and to be strictly construed as such. At common law the power to sell conferred upon the executor was a mere warrant of attorney, did not pertain to him as executor, and therefore did not pass to his successors in the office but died with him.⁸ The case of a power in an executor qua executor is always a power in trust and subject to the principles already laid down. The case generally presented is that of a power to sell real estate, and the power may be appendant when the executor has the title, or in gross when the title is in the heir or devisee.⁹ Where a trust is created under the will, the powers conferred, if any, are powers in a trustee.¹⁰ It is often a difficult matter to determine when the executorship ends and the trusteeship begins. The rule against perpetuities has nothing to do with the solution of this problem, and therefore no discussion on the subject will be offered.

Preliminary Discussion of Powers in the Trustee of a Continuing Trust

410. In this part of the discussion we shall examine the application of the rule against perpetuities to the interests

⁷ For example of such a power see *Dundas's App.*, 64 Pa. 325 (1870).

⁸ It is perhaps needless to observe that in Pennsylvania this difficulty has been overcome by statute, and it is provided that the powers pertaining to an executor

survive and attach to the office. *Act of Feb. 24, 1834, P. L. 70 §12.*

⁹ The common case of a naked power of sale.

¹⁰ Discussed, §410 et seq., post.

limited by a trustee under a special express power.¹ Such powers may be of two kinds:² (1) power to affect the equitable estate; (2) power to dispose of or deal with the legal title.³ We shall first discuss powers to affect the equitable estate, which are governed by the same principle as are powers of appointment and powers in trust.

Power of a Trustee as to the Equitable Title Defined

411. An equitable power is a power to affect the equitable estate of the cestui que trust, such as powers in a trustee to change equitable estates, make advances out of principal, fix the proportions in which one or more of the cestuis que trustent shall share the fund, pay over such part or parts of the income as they may think fit to the cestuis que trustent, etc. Such powers exist only between the trustee and the cestui que trust, and have nothing to do with the legal title, and may be exercised so as to create a remote equitable limitation.

¹ For a definition and discussion of powers in a trustee, see §§154-158, ante. A special express power exists when a trustee is authorized to do some act in connection with the trust property which he would be incapacitated to do as trustee without authority.

² The distinction between a power in trust and a power in a trustee is this: a power in trust is where the sole benefit to the parties entitled lies in the exercise of the power, and when that is done or dispensed with, the trust terminates. A power in a trustee is where the trustee, who has the legal title subject to a superimposed trust, has vested in him power with respect to the trust property, and where the trust still continues, whether the power is exercised or not. In the first case the trust cannot exist without the power; in the second, the presence or absence of the power is immaterial to the continuance or discontinuance of the trust. Two examples will illustrate the distinction: suppose a gift to A. in trust for B. for life, and after his death to C. and

his heirs, with power in A. at any time during the trust, to sell any or all of the trust property and invest the proceeds upon the same trusts. This is a power in a trustee. Suppose a gift to A. with a direction or power to sell the real estate and divide the proceeds among B. and his heirs on or before the death of C., a living person. This is a case of a power in trust.

³ An example will illustrate the distinction: suppose a gift to A. in trust for B. and C. for life, and after the death of the survivor, to X. and his heirs, with power in the trustee to apportion the income between B. and C. in such proportions as he shall think fit. This is the power to affect the equitable estate. Suppose a gift to A. in trust for B. for life, and after his death to his children then living, for their lives, and after the death of the survivor, to the Y. charity, with power in the trustee to sell the trust property at such times and at such prices as he may think best. This is a power to affect the legal title.

Application of the Rule to Powers of a Trustee as to the Equitable Title

412. It seems that the same principle would apply here as would apply to special powers of appointment.⁴ The equitable interests limited by the trustee are created by the donor of the trust because they are made by the trustee under the special power, without which he would be unable to create them. Consequently if the power can be exercised at a remote period the interests limited thereunder will necessarily violate the rule. If the power is so limited that it must be exercised in time, the interests limited thereunder will be valid or not according to whether they take effect at the period which is remote, making the period run from the time of the creation of the interest.⁵ No Pennsylvania case has been found raising any question of the application of the rule against perpetuities to powers in a trustee over the equitable title.⁶

Determinable Trusts and the Rule Against Perpetuities

413. A determinable trust is a trust in which the trustee has discretion or power to terminate the trust at his pleasure and restore the principal to the settlor and his heirs.⁷ If the interests are vested, the discretion will be a restraint on enjoy-

⁴ As to which, see §389, ante.

⁵ Thus, suppose a gift to X. in trust for A., an unmarried person, for life, then to his eldest son for life, then to X., a living person, and his heirs, with power in the trustee to make advances out of principal to the various life tenants in such sums and at such times as he may, in his discretion, think proper. An advance to the son forty years after the father's death, if the son lived that long, would be remote and invalid, and in such case the trustee would be answerable to X. for the unlawful disposition of the principal. As the power in this case is so limited as to be exercisable at a remote period, no limitation under it can be valid. Consequently an advance to A., even though in time, would be unlawful. Gray, *Rule Perp.*, 2 ed. (1906), §246. Where there are no statutes authorizing a substituted trustee

to exercise a personal discretion, it may be argued that such powers are not remote, as they must necessarily be exercised during the life or lives of the trustee or trustees appointed under the will; see remarks of the court, *Allison, P. J.*, in *Penna. Co. v. Price*, 7 Phila. 465 at 469 (1870). If the power was limited to be exercised only during the life of A., an advance under it during that time would be valid. Mr. Gray's remarks are confined to discretion. There is no distinction between a discretion and a power in this respect; see §158, ante.

⁶ As to how far such powers are a restraint on enjoyment, see Chap. 23, post.

⁷ To be distinguished from a power of revocation, which is where the settlor reserves to himself power to terminate the trust. As to which, see §437, post.

ment.⁸ If determinable fees can be created in Pennsylvania, and it seems that they can⁹ and that the possibility of reverter existing in such case is not subject to the rule against perpetuities,¹⁰ then on the principle that equity follows the law there is room to argue that a trust can be created, with power in the trustee to determine the trust in favor of the donor, even though at a remote period, and that the exercise of the power will be valid. The validity of a determinable fee is an unfortunate relic of the early common law, and the principle relating thereto should not, it is submitted, be extended into equity. No case involving this point has been found in Pennsylvania, but such limitations are not uncommon.¹ In *Spring's Estate*² there was a gift in fee with a proviso putting the gift in trust, with a discretion in the trustee to terminate the trust with respect to any or all the beneficiaries named, at such time as the trustee might think it for the best interests of the beneficiaries or their heirs so to do. The exercise of this power seems to involve a remote limitation, as under it the trustee might terminate the trust at a period more than twenty-one years after the death of the survivor of the beneficiaries.³

Preliminary Discussion of the Application of the Rule Against Perpetuities to Powers as to the Legal Title

415. A power as to the legal title is when the trustee is authorized to make some disposition thereof discharged from the equitable right of the cestui que trust.⁴ It was for a long time the common opinion in England that such powers

⁸ For the other principles involved in the exercise of the discretion, see Chap. 23 on Discretion, especially §539, post.

⁹ See §27, ante.

¹⁰ See §368, ante.

¹ See cases cited, §539, post, n. 8.

² 216 Pa. 529 (1907), stated §523, post.

³ If, however, the word heirs in the latter part of the limitation could be construed to mean children, to harmonize with the first part of the will, *Warn v. Brown*, 102 Pa. 347 (1883), the power would be valid as exercisable only during the life of the beneficiaries. No question as to this point was raised in the case,

which, however, is useful as illustrating the form of the power. If it is the law that a trust of an absolute interest is valid, as to which see §524, post, the validity of a determinable trust would not follow, for a trust of an absolute interest is a restraint on enjoyment, and is not within the rule against perpetuities. As shown in the text, the interest taking effect under the discretion in a determinable trust, if it violates anything, violates the rule against perpetuities.

⁴ The usual instances of such powers are: powers of sale, of mortgage, of lease, of partition and of exchange.

were valid, although unlimited as to the time of their exercise. Lord Eldon, in the course of his opinion in the case of *Ware v. Polhill*,⁵ let fall some remarks which raised a doubt as to their validity. The doubt was whether a power in a trustee unlimited as to the time of exercise did not violate the rule against perpetuities.⁶ It is commonly stated that such a power is void. The attention of the learned reader is again invited to the principle that the rule against perpetuities applies to the interests limited under the power and not to the power itself.⁷ There is no doubt that the rule applies to the future interests limited by the trustee. The same question arises here as before: from what date does the period prescribed by the rule begin to run,—from the time of the creation of the trust, or from the time of the exercise of the power, and the answer to this question depends on whether the interests limited by the trustee are considered as created by the settlor of the trust or by the trustee himself. It has been assumed by the text writers and judges who have discussed this point that the interests are limited by the donor of the trust, and that the period, therefore, begins to run from the time of the creation of the trust. It is submitted that this notion is erroneous, that the interests are not created by the donor, and that the period begins to run from the time the trustee disposes of the title. A distinction is commonly drawn between (1) powers in the trustee, which are limited to be exercised within the period prescribed by the rule, and (2) powers which are unlimited as to the time of their exercise.⁸ It is generally said that powers limited to be exercised within the period prescribed are valid. It is conceived, however, that the limitations thereunder may be remote and will consequently violate the rule. If this is so it is because the rule applies to the interests and not to the power.

⁵ 11 Vesey Jr., 257 at 283 (1805).

⁶ For a discussion of the learning on the subject, see Gray, *Rule Perp.*, 2 ed. (1906), §§487-507. Lewis, *Perp.*, (1843), Chap. 25, p. 541. The reader will observe that the language which Mr. Lewis uses in summing up the views of the different text writers is very inaccurate and confusing. He mixes up powers of appointment with powers in a trustee, and it seems that a large part of the difficulty in the subject

has arisen from the failure to sharply distinguish between these two kinds of powers.

⁷ As to which point, see §386, ante.

⁸ Sometimes when the power of sale is apparently unlimited as to the time of its exercise, the court will say that it must be exercised within a time fixed by a construction of the other parts of the will, as in *Wilkinson v. Buist*, 23 W. N. C. 311 (1889).

Taking up the second case of a power exercisable at any time, we shall discuss a power of sale as the most common instance of this power.

Preliminary Discussion of Power of Sale in a Trustee

416. Suppose the trustee sells the trust property under the power. What future interest is limited to which the rule can apply, and when is it created? The practical form in which the question arises is in the consideration of the validity of the title offered by the trustee. We shall consider the question, first, at law, and then in equity. We shall undertake to show that the rule applies to the limitations made by the trustee under the power, and that the period prescribed by the rule begins to run from the time he exercises it, and not from the time of the creation of the trust.

Legal Reasons Why the Period Runs From the Time of the Exercise of the Power of Sale

417. The owner of the fee at law has, in his own right as dominus, sold that fee to another. There was notice of an equitable right in a third party created by an instrument existing in the previous chain of title. As has been shown, that equitable right does not prevent the passing of the title at law. By reason, however, of a particular provision in that instrument, the trustee can dispose of the title free from the claim of the cestui que trust, where before he could dispose of it only subject to the claim of the cestui que trust. Suppose the trustee sells the trust property to a purchaser for value without notice. Would anyone argue that in such a case the remoteness of the estate in fee limited in that conveyance was to be judged as of the time of the creation of the trust? If the purchaser became affected by the notice of the trust after the conveyance, it would necessarily follow, if the rule applies, that the limitation under which he had taken would then become void. The application of the rule against perpetuities is not an equitable doctrine, and does not depend on notice. Suppose the conveyance is to a purchaser without value who has no notice. The result under the well-settled principles of the law is that the latter takes subject to the trust, and that the cestui que trust can follow the trust property and enforce his claim. If the rule applies, the grantee

of the legal title would have nothing, as the limitation of the fee to him would be void, and there would consequently be nothing that the cestui que trust could follow, a result which is contrary to well-settled principles in that branch of the law. How can the circumstance that the purchaser has notice of the trust, but takes discharged thereof because of the power, invalidate on the ground of remoteness a limitation which otherwise would be valid? The trustee's right to dispose of the title does not spring from the power but from his title as dominus. The only effect of the power is to shift the right of the cestui que trust. If, therefore, the trustee should in the conveyance limit interests violating the rule, as he undoubtedly might, the void limitations would not arise under the power. They would be void without the presence of the power.⁹ Are such limitations to be considered as being created by the donor of the trust? The donor parted with the entire legal title and completely exhausted the fee by his limitations. How, then, can any further limitations be said to be made by him? The trustee does not act as his attorney or under a common law power. He acts as dominus.¹⁰

⁹ An eminent judge, Sterling, L. J., in *Goodier v. Edmunds*, (1893), 3 Ch. 455 at 460, has said that the power offends the rule because it enables the donee of the power to vest in a purchaser an estate in fee simple after the expiration of the prescribed period. This remark assumes the question in dispute, which is, from what date does the period run, and the same remark may be applied to an ordinary conveyance. The vendor may vest an estate in fee simple in a purchaser at a period remote, calculating from the date of the last deed. It has never been suggested that there was any reason why the rule should apply to such a case. What is the difference at law between that and a sale by the trustee? The learned judge does not point out any distinction, and it is believed that there is none.

¹⁰ Mr. Gray, *Rule Perp.*, 2 ed. (1906), §509a, says that there is no distinction, in so far as the application of the rule against perpetuities is concerned,

between a power in a trustee, a power in trust, and power to sell given to a stranger, and in this position he is supported by the greatest modern English authorities. It is submitted, however, with due deference to this great weight of opinion, that there is a material distinction. A power in trust is a common law power. It is said to be in trust because the parties to be benefitted by the exercise are entitled to proceed in equity to compel its exercise. At common law, such a power operates as a warrant of attorney. It is, in the case of a power to sell, a direction to an agent to sell and distribute the proceeds. The interest in the proceeds, therefore, is limited by the donor of the power. In case, however, of a power in a trustee, it has been shown in the text that there is no room to argue that the limitations made by the trustee in disposing of the legal title can, in any sense of the word, be said to be limitations created by the donor of the trust.

Equitable Reasons Why the Period Runs From the Time of the Exercise of the Power of Sale

418. In equity, the power operates to shift the equitable estate of the cestui que trust from one property to another. It is, therefore, submitted that in equity there is no limitation of an estate or future interest, and there is no more reason for the rule to apply in equity than at law. The argument has been put in this form: that the power does not defeat or destroy estates but only effects a change of title,¹ to which three answers have been offered, (1) that it is an equitable answer to a legal objection.² To this it may be replied that there is no legal objection. The limitation at law is a transfer of the fee, and is totally outside the application of the rule. (2) The second answer suggested is, that the exercise of the power may cause an entire change in the nature of the property, as from real estate to personal property or vice versa, and may therefore alter the course of descent and the nature of the cestui que trust's interest, and to this it may be replied that it is no concern of the rule against perpetuities whether the nature of the property is changed or not. The fact that the settlor has authorized a change is a sufficient answer in the law of trusts. Why, therefore, is it not an answer to the rule against perpetuities? (3) The third answer suggested is that the power enables the trustee to create a new equitable estate in the property purchased with the proceeds of the sale. To this it may be replied that the estate, or right *in rem.* which the cestui que trust has in the new property purchased with the proceeds of the sale, is a right created by law, and not a right created by the donor of the trust, and is, therefore, not within the scope of the rule against perpetuities. That this is so will appear after a moment's reflection. If the trustee mixes the trust funds with his own at the remote period, or the fund becomes increased at the remote period, the cestui que trust can in each case assert his right, in the one case against all of the trustee's property, and, in the other case, to the increase of the fund. In neither case has the right been created by

¹ Sugden on Powers, 8 ed. (1861), p. 848.

² Hayes' Conv. 3 ed. (1838), pp. 469, 470. The learned author assumes that

the power is void at law. In this assumption, it is submitted, lies the fallacy of his position. The power does not exist at law.

the donor of the trust. A fresh res has been brought within the scope of the trust relation, and when that happens, the cestui que trust acquires a right *in rem*. as to that res by operation of law. Giving this argument its greatest force, it cannot apply to the conveyance of the old trust property made by the trustee, and yet it is to those very limitations that the objection of remoteness is commonly made.

Mr. Gray's Views as to the Application of the Rule to Powers in a Trustee

419. Mr. Gray, however,³ objects to the reasoning advanced in the previous sections as unsound, and concludes that such powers are valid because the trusts to which they are attached must come to an end or be destroyed within the limits fixed by the rule against perpetuities;⁴ that they are unobjectionable because they are destructible,⁵ upon which it may be observed, (1) that a trust does not necessarily come to an end within the period fixed by the rule; (2) that the powers are indestructible during the continuance of the trust. Mr. Gray appears to draw no distinction between the powers of a trustee over the legal title and his powers over the equitable title.

Author's Objection to the View of Mr. Gray Discussed in the Previous Section

420. A case may arise where the trust will not terminate within the period fixed by the rule against perpetuities. Thus, where there is a devise to A. in trust for B. for life, at his death in trust for the eldest grandchild of C., then living, for life, and after the grandchild's death, to X., a living person, and his heirs, with power in the trustee to sell at any time during the continuance of the trust. B. dies, leaving a grandchild of C. The life estate in this grandchild is good, and the trust must remain until his death.⁶ Mr. Gray⁷ says that the power in such a case is void, because it may be exercised at a remote period. To say that the power is valid

³ Rule Perp., 2 ed. (1906), §488, et seq.

⁴ Rule Perp., 2 ed. (1906), §490, et seq.

⁵ Rule Perp., 2 ed. (1906), §482.

⁶ The estate in the grandchild is good because it vests within the period prescribed by the rule. §374, ante, and the

fact that it extends into the remote period is immaterial, §345, ante. The ultimate limitation to X. and his heirs is vested and valid, and the trust must remain to support it.

⁷ Rule Perp., 2 ed. (1906), §500.

because the trust must come to an end within the period fixed by the rule, and then, when faced with a case where the trust continues beyond the period, to say merely that the power is void, does not, it is submitted, meet the difficulties of the case.

Application of Rule to Powers of Sale in Trustees for a Charity

421. Furthermore, if the period prescribed by the rule begins to run from the time of the creation of the trust, in considering the case of a power of sale in a trustee, this further point arises. In what respect, if any, is the case of a power of sale vested in the trustees of an indefinite trust for a charity an exception? An indefinite, or as it is sometimes called a perpetual, trust for a charity is valid.⁸ The power of a sale in the trustee is therefore indestructible by the cestui que trust. We have there another case to which Mr. Gray's reason⁹ does not extend. If the court can authorize a disposition of the trust property free from the claim of the cestui que trust at any time in the future, no matter how remote, why should there be any objection to the trustee doing the same thing under an express power in the settlement? There is no necessity that the power should be valid in such a case of a charitable trust, as the trustees can sell under the order of the court at any time during the continuance of the trust or under the act of April 18, 1853.¹⁰ A reference to this instance of a power of sale is useful as illustrating a case where, if the rule against perpetuities applies, as it is commonly supposed, to a power of sale in a trustee, there must be an exception, whereas under the reasoning already submitted,¹¹ the case is not an exception at all. The law in Pennsylvania will now be examined, and we shall first notice the few cases which have been found.

Cresson v. Ferree

422. In *Cresson v. Ferree*¹ there was a power of sale vested in trustees, unlimited as to time. A sale was made by the trustees under the power during the continuance of the trust, and the purchaser refused to take title. On a case stated,

⁸ See Chap. 26 on Charitable Gifts.

⁹ See §419, ante.

¹⁰ §2, P. L. 503.

¹¹ See §417, 418, ante.

¹ 70 Pa. 446 (1872).

it was held that the title was good, and that the exercise of the power by the trustee was valid. Sharswood, J., in the Supreme Court, said, "We may concede that a general power over an estate, without limitation of time, unless after an estate tail, would violate the rule against the creation of perpetuities. In this case, however, the power of sale is clearly limited to a period during which the trusts created by the will subsist, or some of them, and that cannot exceed a life or lives in being at the death of the testator."² In this the learned judge seems to recognize the principle that the power may be exercised so long as the trust is valid, although he inaccurately states the period for which the trust may subsist.³

Wilkinson v. Buist

423. In *Wilkinson v. Buist*⁴ there was a power of sale in the trustees unlimited as to time. The court in an opinion by Clark, J., said that the other provisions of the will indicated that it was to be exercised only during the lifetime of the widow, and then the learned judge made use, by way of dictum, of the following language:⁵ "A power of sale without limit would doubtless be bad under the rule against perpetuities, and a testator will not be presumed to have intended anything so absurd."⁶

Marshall's Estate

424. In *Marshall's Estate*, No. 1,⁷ a testator gave his estate in trust for the benefit of his children.⁸ On petition by the

² This is clearly a misapprehension. Twenty-one years may be added to the life in being, see §340, ante, and the trust may extend considerably beyond even that period in order to provide for equitable life estates which vest in time, but continue to a remote period; see §§345, 420, ante.

³ See remarks of Ashman, J., in *Githens's Est.*, 24 Pa. C. C. 248 at 250 (1900), where an executor had a power of sale unlimited as to time, which it was argued, was invalid, and the learned judge said that the power of sale could not outlive the purpose it was meant to subserve, and as the period fixed for final distribution was not remote, the power

would be exhausted within the period prescribed by the rule.

⁴ 124 Pa. 253 (1889).

⁵ At p. 261.

⁶ Dicta of Hare, P. J., in the court below, in *Mifflin's App.*, 121 Pa. 205 at 215 (1888), and Stewart, P. J., in the court below in *Johnston's Est.*, 185 Pa. 179 at 189 (1898), accord.

⁷ 138 Pa. 260 (1890).

⁸ The same will was before the court in *Marshall's Est.*, 147 Pa. 77 (1892), probably on an account of the proceeds of this sale, and it was held that the trust was terminable only in the discretion of the trustee. See this question discussed, §538, post.

trustees under the will, and decree thereon directing them to sell a portion of the real estate, some of the children being still living, the judge in the court below⁹ said, that although the will contained no limitation of time within which the sale should be made, the power was good; that it had been exercised frequently since the death of the testator, and the condition of the estate was such that the unsold portion of the real estate must be converted. No question as to remoteness seems to have occurred to either court or counsel. Affirmed by the Supreme Court on appeal without an opinion.

Cooper's Estate

425. In *Cooper's Estate*¹⁰ the testatrix made a gift of all her property to her children absolutely, and then superimposed a trust in her executor to manage the trust property,¹ with a power to rent, mortgage or sell unlimited as to time. The property was to be sold, and the trust terminated when two-thirds of those interested in the estate should so demand. On adjudication of the executor's account the court refused to award the share of one of the cestuis que trustent to him free of the trust.² The court seemed to think it necessary to go on and say that the power of sale was valid, and that the fact that the power of sale could be exercised at any time did not of itself create a perpetuity, as it must be exercised within a reasonable time, and it was within the power of the Orphans' Court to control the exercise of discretion in such case upon the application of the parties in interest. As the trust would be valid without the power of sale, it is difficult to see how any question as to the validity of the power or the application of the rule against perpetuities was properly before the court.

Summary of the Pennsylvania Cases on the Application of the Rule to Powers in a Trustee

426. No very definite conclusion can be drawn from these cases. In *Cresson v. Ferree*³ there is a distinct recognition of

⁹ Hawkins, P. J., in 138 Pa., at p. 262.

¹⁰ 150 Pa. 576 (1892).

¹ As to the validity of this, see §524, post.

² The auditing judge, Hanna, P. J.,

upheld the trust. The court in banc sustained exceptions to his adjudication, and on appeal the Supreme Court reinstated the decree of the auditing judge.

³ 70 Pa. 446 (1872), stated §422, ante.

the principle, although by way of dictum, that the power, even though unlimited as to time, may be exercised so long as the trust lasts. *Marshall's Estate*, No. 1,⁴ seems to strongly sustain the validity of such a power, even when exercised at a remote period, although no question as to the application of the rule against perpetuities was raised in the case. The dicta in *Wilkinson v. Buist*⁵ and in *Cooper's Estate*⁶ are in favor of the proposition that the power must be expressly limited to be exercised within the period prescribed by the rule, apparently proceeding on the proposition that the period prescribed begins to run from the time of the creation of the trust. The question, therefore, may be said to be open in Pennsylvania, and there is room for the Supreme Court to reach the conclusion that the period prescribed by the rule begins to run from the time of the exercise of the power by the trustee, and therefore the circumstance that such a power is limited to be exercised within or without the period, dating from the time of the creation of the trust, is utterly immaterial.

Effect of Control by a Court of Equity on the Application of the Rule to Powers in a Trustee

427. A power of sale vested in a trustee is subject to the control of a court of equity. The cestui que trust may apply for such orders as are necessary to protect his interests. The trustee may, for instance, attempt to sell at a great undervaluation. It is sometimes said that since the power is subject to the control of the court, it may be valid even though unlimited as to the time of its exercise, if the circumstances are such that the chancellor will direct a sale within a reasonable time, and that reasonable time does not extend beyond the period prescribed by the rule, making the period begin to run from the time of the creation of the trust. This notion proceeds upon the fallacy that the power is subject to the rule. The only effect of the approval of the sale by the chancellor is to protect the legal title in the hands of the purchaser from future claims on behalf of the cestui que trust. That approval, therefore, cannot be affected by the application of legal rules to the legal interests vested by the trustee under the power. A trust may subsist for a period

⁴ 138 Pa. 260 (1890), stated §424, ante.

⁵ 150 Pa. 576 (1892), stated §425, ante.

⁶ 124 Pa. 253 (1889), stated §423, ante.

far beyond that prescribed by the rule against perpetuities,⁷ and the chancellor might find it just as desirable to authorize a sale at a remote period during the continuance of the trust as at a period within that prescribed by the rule, making the period run from the time of the creation of the trust. It is submitted, therefore, that the circumstance that the power is subject to the control of a court of equity has nothing whatever to do with the application or non-application of the rule against perpetuities.

Effect of the Act of 1853 on the Application of the Rule to Powers in a Trustee

428. The Act of April 18, 1853,⁸ provides, among other things, that the court may decree "the sale, mortgaging, leasing or conveyancing upon ground rent of any real estate * * held by * trustees for any public or private use or trust, * and although there may exist a power of sale but the time may not have arrived for its exercise or any preliminary act may not have been done to bring it into exercise, or the time limited for its exercise may have expired," etc. While no question has arisen as to the effect of this act upon the application of the rule against perpetuities, it is submitted that under its provisions the court may direct a sale by a trustee at a period which is remote, and as it may direct a sale where the time fixed for the exercise of the power has not arrived, and as that time may be fixed at a remote period, and the act makes no exception in such case, it would seem as if the trustees can sell, even though the power is in terms limited to be exercised at a period beyond that prescribed by the rule. This legislation, therefore, enables a trustee to make a sale of the trust property in cases where, if the rule be applicable to powers in a trustee, as commonly supposed, there could be no sale under the power conferred.⁹

Summary of Pennsylvania Law

429. The question in Pennsylvania under the authorities is open.¹⁰ It is probable that owing to the provisions of the

⁷ See §420, ante.

⁸ §2, P. L. 503; Pepper & Lewis' Digest, col. 4048.

⁹ No trustee need feel any embarrassment as to the possibility of his disposing

of the trust property, even if there is a question as to the remoteness of the power of sale.

¹⁰ See §426, ante.

Act of April 18, 1853,¹ the question has not arisen for decision in Pennsylvania. It is submitted that the period prescribed by the rule should begin to run from the time the trustee exercises the power of sale; that the power of the court to control the sale is utterly immaterial in considering the application of the rule against perpetuities, and that it is eminently desirable that such powers should be valid at all times during the continuance of the trust, no matter what the period of time within which they are limited to be exercised.

Power of Sale in Trustees for Bond Issues

430. Property is frequently conveyed to trustees, in trust, to secure bonded indebtedness, and in such cases there is frequently inserted in the deed of trust a power of sale to be exercised, if occasion requires, for the benefit of the purchasers of the bonds. It is apprehended that the rule against perpetuities is involved in this case in exactly the same particular as in an ordinary case of a power of sale in a trust settlement. No question as to this has come before the Supreme Court of Pennsylvania.²

As to Powers Exercisable After the Termination of the Trust

431. Mr. Gray³ lays down several rules as to the case where the power is to be exercised after the termination of the trust, which rules, it is submitted, are totally unnecessary and overlook the real state of affairs at that time. When the trust terminates, an absolute interest necessarily becomes vested in one or more persons. If the subject matter is real estate, and the circumstances are such that the statute of uses applies,⁴ the power of the trustee falls, as the legal title is at once taken away from him by force of the statute, and the powers have nothing upon which to operate. Where the statute does not apply, the party or parties are entitled to call for a conveyance of the legal title. It remains in the trustee, if at all, by sufferance only, and the powers are at any time destructible by the parties to which the proceeds belong.⁵ Any limitations by the trustee in such case are, in

¹ 2 P. L. 503, see §428, ante.

² There was such a power in the case of *Baneroft v. Ashhurst*, 2 Grant's Cases, 513 (1860), but no question as to the application of the rule was raised; see

Gray, *Rule Perp.*, 2 ed. (1906) §565.

³ *Rule Perp.*, 2 ed. (1906), §506.

⁴ See Chap. 6, ante, on the statute of uses.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §490.

effect, limitations by the cestui que trust, who is the real owner, as they are made by his sufferance only. As the rule looks at the substance and not at the form the period prescribed by the rule begins to run from the time of the exercise of the power for the same reason that governs limitations under a general power of appointment.

As to Case of a Trust of an Absolute Interest

432. If the conclusion is reached that the powers in a trustee, even though unlimited as to time, are unobjectionable in so far as the rule against perpetuities is concerned, then they are valid during the continuance of the entire trust, no matter to what remote period the trust may subsist. If, then, the Supreme Court should reach the conclusion that the trust of an absolute interest is valid or that the enjoyment or possession of an absolute estate may be postponed to a remote period⁶ by the device of a trust, there should be no distinction in the application of the rule. If in such a case it should be felt that the powers are objectionable because exercised at such a remote period, it should be remembered that the error lies in permitting such objectionable trusts in the first place, and not in upholding the validity of the power.

Power to Appoint New Trustees

433. A power to appoint new trustees, it seems, does not offend against the rule.⁷ The question has not arisen in Pennsylvania, although such powers are constantly inserted in trust settlements, and no doubt appointments under them have been made at a remote period, computing from the creation of the trust. If no sale can be made under a power in a trustee at a remote period, then no appointment of a new trustee can be made under a similar power. There is no distinction between the two cases. The appointment of a new trustee necessarily either expressly or by implication vests in

⁶ This question discussed, Chap. 22, post.

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §509, admits this. He falls back on his former reason that as soon as the cestui que trust calls for the legal title the trust is at an end. The reason however, would not

apply to the case put in §420, where the trust may continue beyond the period prescribed by the rule. The reason assigned by the learned author does not, therefore, explain why they are remote in one case and not in another.

him the legal title to the trust estate. It is submitted that it is desirable to uphold the validity of these powers, and that the consideration of them further enforces the position that the period prescribed by the rule against perpetuities in all cases of a power in a trustee as to the legal title begins to run from the time of the exercise of the power.

Power to Lease

434. A power in the trustee to lease presents a still stronger case⁸ for the non-application of the rule against perpetuities. A lease in praesenti never violates the rule at law, and the fact that it is made by a trustee under a power can make no difference, and as there is no shifting of the equitable estate of the cestui que trust, there is no possible ground to argue that the rule applies.¹ If the trustee should make a lease to begin in futuro, at a time beyond the period prescribed by the rule, the lease would, of course, be void, as the limitation would violate the rule at law. It may be the law that where the lessee takes with notice of the trust his lease must be surrendered by order of the court when the trust ends.²

Hutchison's Appeal

435. In *Hutchison's Appeal*³ the testator gave the residue of his estate in trust either to rent or to sell, as the occasion offered, and in further trust, upon receipt of the rents or the purchase money, to divide the same among the testator's four daughters, their heirs and assigns in equal shares. In a proceeding in partition the court said that the bill would not lie, as there was a trust under the terms of the will, and as to the power to lease, the Supreme Court, in a per curiam opinion, used the following language:⁴ "It is very clear that it would be an abuse of his option to lease were

⁸ A lease is incidental to the office of trustee, and no express power to make one is necessary.

¹ A lease of undue length does not call for the application of the rule against perpetuities; see §363, ante. The question is whether it is an abuse of power by the trustee, whether the lease is so long as to interfere with the proper disposition of the legal title or with the equitable

estate of the cestui que trust; see *Goehring's, App.*, 81½ Pa. 283 (1875). Lease for five years with option of renewal by lessee for five years, was held valid in *Hutchison's App.*, 82 Pa. 509 at 514 (1876).

² See *Standard Paint Co. v. Mfg. Co.*, 133 Pa. 474 (1890).

³ 82 Pa. 509 (1876).

⁴ On p. 514.

he to make leases conflicting with the testator's intent to sell and furnish such a fund for distribution among his daughters, or contrary to the policy of the law which forbids perpetuities." It is submitted that in this the court overlooked the principles already discussed, that a lease, no matter how long, does not violate the rule. The learned judge probably had in mind the thought that a lease of extraordinary length would postpone the power to sell until a remote period. This, however, is a fallacy, as the property could be sold subject to the lease, and while the existence of the lease might depress the market price it could not destroy the alienability of the title or prevent the operation of the power of sale.

Summary of the Law as to Powers in a Trustee as to the Legal Title

436. If a power in the trustee is so limited as to be exercisable only within the period prescribed by the rule against perpetuities it is admittedly valid,⁵ and no case seems to have arisen deciding the question of the application of the rule to the interests actually limited in such a case. If it is not so limited and may be exercised at a remote period the law as to the application of the rule is far from clear. In England it seems to be settled that such powers are valid, whether they are in terms limited to be exercised within the period prescribed by the rule or not.⁶ But when the case is put where the trust may continue until a remote period the power is said to be void. The learning on the subject in the books is confusing in the extreme, and the discussion assumes the point in controversy. It is submitted that on principle the power is valid, and that the period prescribed begins to run from the time of its exercise and not from the date of the settlement in trust. The notion that powers in a trustee unlimited as to the time of their exercise violate the rule against perpetuities seems to have had its origin in the mistaken idea that a power of appointment which may be exercised at a remote period is void under the rule. As already pointed out, the rule applies to the future interests limited under the power, and it is inaccurate to say that the power is void under the rule. If this point had been apprehended

⁵ See §415, ante.

498; Lewis, *Perp.*, pp. 542-555 (1843).

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §§431-

and it had been clearly borne in mind that the interests alone are the concern of the rule against perpetuities, the difficulty on the subject would have vanished. The supposed analogy disappears completely on further examination. The interests limited under a power of appointment are judged as to their remoteness by their distance in time from the creation of the power, because under the doctrine relating to powers of appointment apart from the rule against perpetuities, the limitations under the power are considered as the limitations of the donor himself. The power in a trustee stands on a different footing. The settlor parted with his entire interest when he created the trust. The limitations as to the legal title made by the trustee are made by him as dominus and are remote only as respects their distance in time from the date when the trustee creates them.

Powers of Revocation

437. Suppose a power is reserved to revoke the trust, declare new uses and require a reconveyance. Such powers are exceedingly common in the case of settlements inter vivos. No question has ever arisen in Pennsylvania in regard to their validity. If reserved to the grantor the interest under the exercise of the power must be valid, as the power must be exercised within the period, that is, during his life; if, however, reserved to the grantor and his heirs, it seems that the limitations thereunder would be invalid.

Summary of the Chapter

438. The rule applies to interests limited under a power as well as to other future interests. The rule does not apply to the power itself.⁷ Since the period prescribed by the rule begins to run from the date of the creation of the interest to which it is applied,⁸ it follows that in those cases where under other principles of the law, the interests limited under the power are considered as created by the donor of the power, the remoteness of such interests will be judged by their distance in time from the creation of the power and not from the time of its exercise.⁹ In the case of special

⁷ See §386, ante.

⁸ See §389, ante.

⁹ See §342, ante.

powers of appointment,¹⁰ powers in trust,¹ and powers in a trustee to affect the equitable title,² powers of revocation³ and powers in an executor,⁴ the interests limited under the power are interests created by the donor of the power, consequently the rule begins to run from the time of the creation of the power. In the case of a general power of appointment⁵ the limitations are considered as being made by the donee of the power, and the period prescribed by the rule, therefore, begins to run from the time of the exercise of the power. Where there is a power in a trustee as to the legal title, the law is doubtful.⁶ No case has been found in Pennsylvania deciding the point, and it is submitted in the preceding discussion that it is a better view that the interests limited by the trustee in such a case are to be considered on the same footing as those made by the donee under a general power of appointment, and, therefore, the period prescribed by the rule will begin to run from the time of the creation of the interests by the trustee under the power.⁷

¹⁰ See §389, ante.

¹ See §403, ante.

² See §412, ante.

³ See §437, ante.

⁴ See §406, ante.

⁵ See §400, ante.

⁶ See §436, ante.

⁷ Sugden, Powers, 8th ed. (1861), p. 846 et. seq.

CHAPTER 18

GIFTS TO A CLASS AND THE RULE AGAINST PERPETUITIES

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Preliminary Discussion

440. The application of the rule against perpetuities to the case of a gift to a class involves some very nice points and will repay careful study. It will be necessary to first discuss the nature of such a gift, and then examine the particulars in which the rule applies.¹

Definitions of a Class and of a Gift to a Class

441. By a class is meant a number of persons who are

¹ A gift to a class is to be distinguished from a gift to a particular member of a class, as in *Chambers v. Wilson*, 2 Watts, 495 (1834), stated §347, ante; or a gift

over on a member of a class reaching a certain age, as in the case of a gift for testator's children for life, and upon the youngest child reaching thirty, over to

designated by some general description applicable to all of them.² A gift to a class is a gift to the members of the class by their general description,³ which description furnishes the means of identification. The gift is not to the class but to persons who are or may become members thereof. Gifts to a class may be (1) present or immediate gifts, (2) future gifts, which may be either after the termination of a preceding estate or without the gift of a preceding estate.⁴

General Principle as to the Closing of the Class

442. The class is said to be closed when all the persons who are to be members thereof have been finally ascertained, and, in the case of gifts to a class, when all the persons who are to share in the gift have been finally ascertained.⁵ The final ascertainment may be (1) at the time fixed by the settlor,⁶ or (2) because there is no possibility of any other member of the class coming into existence.⁷ It is clear that the

his grandchildren in equal shares; or a gift over on the death of the survivor of a class, as in the case of a gift for the testator's children for life, and on the death of the survivor, to his grandchildren then living, in equal shares.

² As to the distinction between a definite and an indefinite class, see Chap. 26, on Charitable Gifts. This distinction does not concern us here.

³ "A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews,' but, in legal language, the question whether the gift is one to a class, depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." Jarman on Wills, 6th Amer. ed. (1893) Vol. 1, p. 262. In this definition the learned author overlooks the facts (1) that the number of the persons is not

necessarily uncertain at the time of the gift, and (2) that it is not the mode of the gift but the object of the gift which distinguishes a gift to a class.

⁴ For a discussion of this, see §§88, 69, ante, on remainders to a class.

⁵ Mr. Gray, Rule Perp., 2 ed. (1906), §121a, says that the class is closed and the number determined at the period of distribution. It is submitted, however, that the time of distribution depends on the time of the closing of the class, and that the number of persons who are to take is determined at the time of the closing. Since, however, the time for distribution is generally fixed by the settlor, and that is the only evidence of the time of closing, it may be said that the period of distribution fixes the closing of the class.

⁶ E. g., in the case of a gift to the grandchildren of A. living at the time of his decease, the class is closed at A.'s death; see *Williamson's Est.*, 143 Pa. 150 (1891).

⁷ E. g., where there is a gift to all the grandchildren of A., the class is closed at the death of A.'s last surviving child, at which time there is no possibility of there being any more grandchildren.

distribution must be made at the time fixed for the members of the class to take, and that consequently any member of the class who afterward comes into existence cannot participate.⁸ In most cases the settlor fails to fix any time for the closing of the class, and the courts have laid down certain more or less arbitrary rules of construction applicable to such cases. As most of the cases which arise come under one or another of these principles of construction it will be necessary to give these principles some attention. The underlying principle is that, unless otherwise specified, the class is closed as soon as one member is entitled to participate. His right to participate and receive his share cannot be postponed in order to give the class a chance to increase, unless the settlor has expressly so designated.

Closing of Direct Gifts to a Class

443. In the case of a direct gift to a class the gift vests only in those members of the class who are ascertained at the date of the gift or the death of the testator, as the case may be. The class is then closed.⁹ A clause may, however, be added to such a direct gift postponing the time of payment or enjoyment.¹⁰ If the clause has the effect of making the class close at a remote period, it will violate the rule against perpetuities. If it merely postpones the time of payment of a vested gift, it violates, if it violates any rule, the rule forbidding restraints on enjoyment, and not the rule against perpetuities, as supposed by Potter, J., in *Shallcross's Estate*.¹ It is often a difficult matter of construction to determine whether there is a direct gift to a class, with a clause

⁸ As to how far a child *en ventre sa mere* is included in the gift to a class, see *McKnight v. Read*, 1 Whart. 213 (1835); *Laird's App.*, 85 Pa. 339 (1877); 21 *Harv. Law Rev.* 360 (1908).

⁹ E. g., where there is a gift to the children of A., a living person, only those children born at the date of the gift can take; *Pemberton v. Parke*, 5 Binney, 601 (1813); *Gray, Rule Perp.*, 2 ed. §121a; *Darrah v. Darrah*, 202 Pa. 492 (1902).

¹⁰ E. g., where there is a gift to the children of A., a living person, to be

paid to them when they reach thirty. "To the children of my son C., to be divided among them when the youngest shall arrive at the age of twenty-one years"; *Larkin's Est.*, 4 Del. Co. 340 (1890); see also *Phillips' App.*, 93 Pa. 45 (1880); *Barclay v. Lewis* 67 Pa. 316 (1871); *Horner's Est.*, 10 D. R. 729 (1901); *Shallcross's Est.*, 200 Pa. 122 (1901).

¹ 200 Pa. 122 (1901), stated §503, post; see also *Gray, Rule Perp.*, 2 ed. (1906), §121b; if void is void as a restraint on enjoyment; see this subject discussed, Part IV; see also §449, post.

of postponement, or whether there is a gift contingent upon the time of payment.²

Closing of Future Gifts to a Class

444. In the case of future gifts after a preceding particular estate the class closes at the termination of the preceding estate.³ In the case of a future gift without any preceding particular estate the class closes at the time fixed for the gift to take effect. There seems to be no room in this case for any arbitrary rule of construction.

The Application of the Rule Against Perpetuities to Gifts to a Class

445. Where all members of the class who are to take do so upon a certain contingency, at which time they are all ascertained together, and the contingency is remote, the entire gift fails.⁴ Where the class is left open until a remote period, and there are some members who have been or will be ascertained within the limits prescribed by the rule, the law is that unless the donor has made the gifts clearly separable, so that each member of the class takes independently of every other member, they must all fall together. This is well settled,⁵ but the reason is not so clear.

² See *Coggins' App.*, 124 Pa. 10 (1889); *Gray, Rule Perp.*, 2 ed. (1906), §372, and note.

³ *Minnig v. Batdorff*, 5 Pa. 503 (1847); *Haskins v. Tate*, 25 Pa. 249 (1855).

⁴ *Davenport v. Harris*, 3 Grant, 164 (1855); *Donohue v. McNichol*, 61 Pa. 73 (1869) stated §348, ante; *Barclay v. Lewis*, 67 Pa. 316 (1871), stated §339a, ante. Gift to the heirs of A. in default of appointment by B., a living person; *Brooks' Est.*, 140 Pa. 84 (1891). A gift to testator's grand-nephews and grand-nieces living at the end of ten years; *Williamson's Est.*, 143 Pa. 150 (1891). To the children of the testator living at the end of ten years; *Forney's Est.*, 161 Pa. 209 (1894). At the death of A., to be divided among their children then living; *Siddall's Est.*, 180 Pa. 127 (1897), stated §450, post; *Johnston's Est.*,

185 Pa. 179 (1898), stated §472, post; *Ward's Est.*, 8 D. R. 701 (1899). To the lawful heirs of A. "when the youngest living grandchild of my son A. has reached twenty-two years;" *Gerber's Est.*, 196 Pa. 366 (1900), stated §474 post. See also *Goddard's Est.*, 198 Pa. 454 (1901).

⁵ See *Coggins' App.*, 124 Pa. 10 (1889), where a gift to the grandchildren of the testator to be paid to them upon attaining twenty-five years was held invalid. The same will was before the court in *Williamson's Est.*, 12 Phila. 64 (1878); s. c., 3 Walk. 426 (1881); see criticism by Mr. Gray, *Rule Perp.*, 2 ed. (1906), §375a. This was a close case on the question of construction and the Supreme Court would have been amply justified in adopting a construction which would not have resulted in a violation of the rule; *Gray, Rule Perp.*, 2 ed. (1906), §633.

Mr. Gray's Observation on the Application of the Rule

446. Mr. Gray⁶ says that the share of the one member is dependent on that of all the others, and so long as the share of one is undetermined, the shares of all are undetermined, and if the shares are left undetermined until a remote period, the whole gift is void. This reason, however, does not explain why the whole gift falls when the shares of some are undetermined. Furthermore, those who have vested interests are only postponed in enjoyment, and the rule against perpetuities does not affect postponement of enjoyment. The reason usually given in the books is very clearly put by Ashman, J., in the court below, in *Coggins' Appeal*.⁷

The Author's Observation on the Application of the Rule

447. The real principle, it is suggested, is this: the interests are not really inseparable, and the court can wait until the class closes. A division can then be easily effected between those as to whom the interest is remote and those as to whom it is valid, and the usual disposition made of the remote interests violating the rule.⁸ The principle may be stated thus: the exact division of the property to be made cannot be determined until all the persons intended to be benefitted have been ascertained, which cannot happen until the class is closed, and as that will occur at a remote

⁶ Rule Perp., 2 ed. (1906), §§375 and 399.

⁷ 124 Pa. 10 at 16, (1899), the learned judge said, "But where the gift is a unit because to a class, its validity will depend upon the eligibility of every member of that class, prospective as well as present, and possible as well as actual, to take under the rule. The reason, as given in *Leake v. Robinson*, 2 Mer. 362, is the difficulty of determining what would have been the intention of the testator if he had been advised of the existence of the rule; whether, for instance, he would have left out after-born grandchildren rather than abridge the period of vesting at twenty-five, or have postponed it until twenty-one, and so have included all who should have been born before that time; and be-

cause where the gift operates by way of executory devise, the devise itself being an infringement of common law rules, and allowable only on condition that it shall not exceed established limits, the gift is wholly void if it violates that condition at all." This reason assumes that the gift is to the class as a unit. The objections to this have been pointed out; see §69, ante.

⁸ Consider in this connection the cases arising under charitable trusts, where a gift is to benevolent and charitable objects and the gift to benevolent objects is held void and that to charitable objects is held to be valid. There are some authorities for the proposition that the court will declare a resulting trust *pro tanto*: see Chap. 26 on Gifts to Charities.

period, the court must, in order to make a proper division, wait until that period has arrived. This course is practically inconvenient. The whole gift is therefore declared void. It is not that the limitations are inseparable, but that they cannot be separated without great practical inconvenience.⁹

Gift to Grandchildren of Testator as a Class Upon a Remote Contingency

448. Suppose there is a gift to such of the grandchildren of the testator as reach twenty-five. It is assumed that the gift is to be construed as contingent, so that it vests in the several grandchildren when they reach twenty-five.¹⁰ The rule of construction is that the class closes as soon as one member reaches the age of twenty-five.¹ Suppose further that there is at the time of the testator's death a grandchild living over four years old, who has not reached twenty-five. It is clear that if he reaches twenty-five the class will close in time, but as he may die before that period, and a grandchild born after the testator's death may be the first to reach twenty-five, the class may close at a remote period, and as the gift to all is contingent until the class closes, there is a possibility that they will all be remote, and are, therefore, all void.² Mr. Gray observes³ that the gift to the grandchild four years old at the death of the testator, is good, as he must take, if at all, within the period prescribed by the rule, but there may be further payments to him or his representatives because of

⁹ This is the same reason as that advanced in §335, ante, for the principle that the rule is applied as of the date of the gift and eliminates all limitations which may possibly be remote; see Lewis, *Perp.*, pp. 455, 456 (1843).

¹⁰ For such a case see Seibert's App., 13 Pa. 500 (1850); where the clause was "to be paid to them as they arrive at the age of twenty-one years."

¹ The gift is contingent upon reaching twenty-five: *Heisse v. Markland*, 2 Rawle, 274 (1830); *Schuldt's Est.*, 199 Pa. 58 (1901) *semble*.

² *Rule Perp.*, 2 ed. (1906), §375. Mr. Gray says that the gift to all the members of the class is void, although there are some grandchildren born at the

death of the testator who, if they reached twenty-five would be entitled to share, because none of those born at testator's death may reach twenty-five, and the whole class may, therefore, ultimately be composed of grandchildren born after the testator's death; Gray, *Rule Perp.*, 2 ed. (1906), §373. It is submitted, however, that the vice of the gift does not lie in the fact that those who may take are born after the testator's death, but in the fact that they may take at a remote period. The period of their birth is immaterial; Gray, *Rule Perp.*, 2 ed. (1906), §232.

³ *Rule Perp.*, 2 ed. (1906), §375; it is assumed that the remarks in this section relate to the case of a contingent gift, apparently under discussion at this point.

the death of some subsequently born grandchild under twenty-five, and therefore his share may be increased by payments at a period beyond that prescribed by the rule. There can, however, be only one distribution of the fund. Subsequent distribution, as supposed by the learned author, can occur only when there are vested interests with a clause of postponement of enjoyment. The case under discussion is that of a contingent gift. The difficulty lies in the circumstance that the fund is to be distributed between parties, as to some of whom the limitations are in time, and as to some of whom they are remote, and as the gifts cannot be separated without waiting until a remote period, the gift to all is void. If, however, there is a grandchild twenty-five years old at the testator's death, the class is immediately closed, and as none can participate except the grandchildren living at that time, the gift is valid as to all those grandchildren.⁴

Vested Gift to the Great-Grandchildren of the Testator

449. Some of the principles involved in the case of a gift to a class are raised by a hypothetical case put by Mr. Gray, which has given rise to considerable discussion and which will now be noticed. Mr. Gray⁵ supposes the case of a direct gift to the great-grandchildren of the testator to be paid to them when they reach twenty-five,⁶ and he says that each great-grandchild, as born, takes a vested interest, and the clause of postponement is valid in order to give the class of great-grandchildren a chance to increase.⁷ The rule of construction applied here is that the class closes when the eldest great-grandchild reaches twenty-five, or if he dies before attaining that age, when he would, if living, reach twenty-five. If there are no great-grandchildren born and four years old

⁴ Gray, Rule Perp., 2 ed. (1906), §379.

⁵ Rule Perp., 2 ed. (1906), §121b.

⁶ Mr. Gray, Rule Perp., 2 ed. (1906), §121b, says grandchildren. This does not raise the question as pointed out by Mr. Kales, 19 Harv. Law Rev., 598 (1906). See note to the same article by Mr. Gray on p. 604. The reason the gift to the grandchildren does not raise the point is this: all the grandchildren of the testator will necessarily be ascertained within the lives in being at the testator's death, to

wit, the life or lives of all his children, and consequently, no clause of postponement, even if valid, as to the grandchildren, can operate to introduce a number of the class at a remote period. As the testator may obviously have great-grandchildren born at a remote period the cause of postponement giving the class of great-grandchildren a chance to increase may introduce an interest at a remote period.

⁷ Gray, Rule Perp., 2 ed. (1906), §121a.

at the date of the testator's death the class will close at a remote period. Mr. Gray says⁸ that as the gift to the class is consequently bad, there is no reason to sustain the clause of postponement, and that it will therefore be rejected, and all the great-grandchildren, if any, in esse at the time of the testator's death, even if under four years old, will take the whole gift.⁹ Mr. Kales¹⁰ criticises this conclusion of Mr. Gray on the grounds (1) that it makes the question of construction turn on whether the rule applies, and (2) that it makes the invalidity of the clause of postponement rest on a principle of law which has never been judicially determined, and which, therefore, is not the subject of a valid conclusion. The question involved is this: did the testator intend to make a vested gift and include only the great-grandchildren living at the time of his decease, or did he intend to include all the great-grandchildren born before the eldest reached or would have reached, if living, twenty-five years? If he intended an immediate gift only to those living at his death, the clause of postponement of payment is void as a restraint on enjoyment, and all those great-grandchildren ascertained can unite and compel an immediate distribution of the fund. If he intended a gift to a class composed of those living and to be born before the eldest reached or would have reached, if living, twenty-five, the rule against perpetuities is involved because there is a gift to a class which includes interests which may vest at a remote period, and as there can be no separation the gift to all the members of the class falls under the rule previously laid down.¹ The gift to those in esse can be sustained only on the theory that they alone were intended to take, and that, therefore, the clause of postponement is void apart from the rule against perpetuities.² The difficulty is

⁸ Rule Perp., 2 ed. (1906), §121b.

⁹ Mr. Kales, 19 Harv. Law Rev. 598, et seq. (1906), supposes that Mr. Gray means that there are two gifts, (1) a gift to the great-grandchildren living at the death of the testator, and (2) a gift to such great-grandchildren of the testator as may be born after his death and before the eldest great-grandchildren born at the testator's death actually reaches or would have reached, had he lived, the age of twenty-five; that the first is valid and the

second void for remoteness and to be disregarded and the original gift sustained, which view, Mr. Gray, in a note to the same article, on p. 604, disclaims having entertained.

¹⁰ 19 Harv. Law Rev. 598 et seq. (1906); 20 Harv. Law Rev. 201, (1907).

¹ See §445, ante.

² See Gray, Rule Perp., 2 ed. (1906), §§638-641; *Oppenheim v. Henry*, 10 Hare, 441 (1853); *Gray's Cases on Property*, Vol. 6, p. 132.

caused by the failure to observe that if the clause of postponement operates only as to the time of payment, it is void, and the rule against perpetuities is not involved, and that it can have no effect to introduce other vested interests unless it is used as showing an intention to postpone the time of distribution until the period fixed. The intention on this point must first be ascertained and then the rule applied.

Siddall's Estate

450. In *Siddall's Estate*³ there was a gift in trust to pay the income to A. and B., testator's children, during their natural lives, and at their decease, the principal to be equally divided among their children who may then be living, and the issue of any deceased child or children, whether therein named or not, as they arrived at legal age. It was argued that the clause as they arrived at legal age postponed the vesting until a remote period. The court below, in an opinion by Penrose, J., affirmed, on appeal, by the Supreme Court, said that the gift to the children and grandchildren was vested and restricted by the words at their decease and then living to those ascertained at the death of A. and B., and the clause as to payment at twenty-one operated as a postponement of enjoyment and did not affect the vesting.⁴ Consequently, as there must be either a grandchild or a great-grandchild living at the death of A. and B. who would reach the required age twenty-one years after their death, the class would close in time and no grandchild or great-grandchild born after that period could participate. A grandchild or great-grandchild born during the twenty-one years after the death of A. and B., would reach twenty-one more than twenty-one years after their death, and such grandchild or great-grandchild would, at that time, take a share in the fund. As, however, his share would be vested and go to his executors if he died under twenty-one, there would be no possibility of any diminution of the fund. The fund, therefore, could be divided between the grandchildren and great-grandchildren living when the first grandchild or great-grandchild reached twenty-one, or would have reached twenty-one, if he had lived.

³ 180 Pa. 127 (1897).

apply to both classes: *Phillips' App.*, 93

⁴ The twenty-one years clause would Pa. 45 (1880).

Shallcross's Estate

451. In *Shallcross's Estate*⁵ there was a clause postponing the payment of the gift to the grandchildren of the testator until they were twenty-five. The gift vested in the whole class of grandchildren, and could not be void as to anyone. The clause of postponement violated the rule forbidding restraints on enjoyment and not as was said by the court, the rule against perpetuities.⁶

McCullough v. Seitz

452. In *McCullough v. Seitz*⁷ there was a gift of real estate by deed in trust for the wife and children of John during his life, and after his death, for his widow for life, and after her death to the children of John then surviving, in equal shares. The case arose on an action of trespass by a son of John, the widow being dead. The court held that he was barred by the statute of limitations. The decision was correct but the reasoning open to objection. The plaintiff had no title at all, the entire title being in the grantor and his heirs by way of resulting trust, the limitations to the children being void under the rule against perpetuities. The gift over to the children was clearly contingent upon their surviving the death of the widow. That event might happen at a remote period, because John might leave as his widow a woman born after the date of the deed. This is one of the rare cases which come before the court after the period prescribed by the rule has elapsed.

⁵ 200 Pa. 122 (1901), stated §503, post. see §443, ante, and §503, post.

⁶ For further observations on this case ⁷ 28 Super. Ct. 458 (1905).

CHAPTER 19

WHERE THE FUTURE INTERESTS ARE INVALID UNDER THE RULE

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Preliminary Discussion

458. It may be pointed out in the beginning that the rule applies only to future interests which are remote,¹ and has no further effect than is necessary to cut out the particular offending limitation. The rule, while severe, is practical, and violates the express intention no further than is necessary. Several cases may arise: (1) where the whole gift is void; (2) where there are valid and invalid limitations which cannot be separated; (3) where the prior limitations are void; (4) where the subsequent limitations are void; and, in each case, we must consider the disposition of the property embraced under the void limitations, and the question may arise in each case as to limitations under a deed or will, legal or equitable,² and as to real estate or personal property.³

Where the Gift of the Entire Property by Deed at Law Violates the Rule

459. Where the gift by deed of the entire property at law violates the rule, the case stands as if the instrument had never been executed, and the property will remain in the grantor just as it was before, and the rule is the same whether the subject matter is real estate or personal property.⁴

Where the Gift of the Entire Property at Law by Will Violates the Rule

460. Where the disposition is by will of a legal interest, and the entire gift violates the rule against perpetuities, the property attempted to be disposed of by the void limitation will, in the case of a specific bequest or specific devise, be included, as in other cases, in the residuary devise, if any;⁵

¹ For a discussion of the interests to which the rule applies, see Chap. 16, Summary, §382, ante.

² Mr. Gray draws no distinction, in this connection, between gifts at law and gifts at equity. The distinction, it is submitted, is of great practical importance.

³ For a discussion of the cases where the limitations under powers are invalid under the rule, see §§392-394, ante.

⁴ No case has been found of a limitation at law where the whole gift violates the rule. An illustration will perhaps suffice:

a gift to B. thirty years after the death of A. would be void. As to the possibility of a limitation of future interests in personal property by deed *inter vivos*, see §§92, 95, ante.

⁵ As to personal property by the common law, see Gray, *Rule Perp.*, 2 ed. (1906), §248, n. 5; *Woolmer's Est.*, 3 Whart., 477 (1838). As to real estate, by the provisions of the Act of June 4, 1879, P. L. 88, §2. As to the law before the Act of 1879, see *Massey's App.*, 88 Pa. 470 (1879).

and where the gift is of the residue or there is no residuary devise, there is an intestacy as to both real and personal property.

Gift of the Entire Property by Deed of Trust Violating the Rule

461. Where there is a deed of trust in which there is only one limitation of the entire equitable estate, and that limitation is void, under the rule it is clear that the invalidity of the interest will destroy the whole equitable gift and produce a resulting trust to the grantor and his heirs or next of kin, according to the nature of the property.

Gift of the Entire Property by Will in Trust Violating the Rule

462. Where there is a gift in trust by will, and the entire equitable limitation violates the rule, there is a resulting trust to the residuary devisee or legatee in the case of a specific bequest or specific devise, and to the heir at law or next of kin, according to the nature of the property, if there is no residuary devise or if the trust is of the residue.⁶ The usual example of such a trust is a direction to accumulate income and pay the same, with the principal, at a remote period.⁷

Where Valid and Invalid Limitations Cannot be Separated

463. Where there are two or more interests, one of which is void and the other valid, and they are so limited that they cannot be separated, they will both fall together. The question of separability, however, more accurately speaking, relates to the property covered by the limitations, and the difficulty is rather in apportioning the property between the limitations than in the separation of the limitations on the face of the gift. Where the donor fails to make any indication of how the property is to be apportioned between the void and valid limitations, the court will declare the whole gift void, as it cannot say what the testator would have done if his attention

⁶ Equity following the law, as to which see §460, ante. It is sometimes said that there is an intestacy: this is a fallacy; see §151, ante.

⁷ For an excellent illustration of such

a direction, see *Hillyard v. Miller*, 10 Pa. 326 (1849). The subject matter was real estate, and the heir recovered in an action of ejectment on his equitable title. See Chap. 25 on Accumulations.

had been called to the invalidity of one of the limitations,⁸ and the rule is the same whether the interests are legal or equitable. The court should be astute to separate the limitations, as the rule against perpetuities is not to be applied except where absolutely necessary.⁹

Where the Prior Limitations are Void

464. Where, however, there is an ultimate vested interest the case is different; the preceding contingent interests, if void, are cut out and the vested interest remains. There seems to be no reason to destroy it because of the invalid preceding interests.¹⁰

Where the Subsequent Limitations are Void—Preliminary Discussion

465. Where the subsequent limitations are void we may distinguish two cases: (1) where the prior valid limitations exhaust the entire interest; (2) where the prior valid limitations do not exhaust the entire interest; and in the latter case there is an important distinction between a gift at law and a gift in equity by deed or by will. Furthermore, the subsequent void limitations do not carry down the preceding valid ones unless they are inseparable.¹ Cases of such inseparability will be extremely rare.

Where the Prior Valid Limitations Exhaust the Fee

466. When the prior valid limitations exhaust the fee the subsequent void limitations drop, and the case stands as if they had never been inserted in the instrument. The preceding estates remain intact, and the result is the same either at law or in equity, with respect to a gift by deed inter vivos

⁸ For a discussion of this principle with respect to gifts to a class, see §445, ante.

⁹ This principle was overlooked in *Johnston's Est.*, 185 Pa. 179 (1898), for a discussion of which, see §472, post. Where the testator has given fixed charges out of income and made a void disposition of the balance the limitations are clearly separable, which was overlooked by the

court, in *Gerber's App.*, 196 Pa. 366 (1900), stated §474, post.

¹⁰ *Gray, Rule Perp.*, 2 ed. (1906), §§251-257; dictum, *Penrose, J.*, in *Boyd's Est.*, 199 Pa. 487 at 493 (1901), stated §398, ante; *Chambers v. Wilson*, 2 Watts, 495 (1834), stated §347, ante.

¹ See remarks of *Clark J.*, in *Lawrence's Est.*, 136 Pa. 354 at 365 (1890), stated §396, ante, *semble*. See §463, ante.

as to realty or personalty,² or a gift by will. In either case the future interests are cut out and the prior gifts remain.³

Where There is a Gift by Deed at Law and the Preceding Valid Estates Do Not Exhaust the Fee

467. In the case of a limitation by deed inter vivos of real estate where the preceding valid limitations do not exhaust the fee, it seems very clear that there is a reversion of the undisposed of residue.⁴ Where there is a limitation of personal property by deed inter vivos, the case is not so clear. It is assumed, for the present, that future legal interests in personal property can be created by deed inter vivos.⁵ There can, however, be no reversion of personal property. If the future interests are treated as remainders, there would be no way of getting the undisposed of residue back to the donor. If the future interest is an executory bequest, it seems that the same result would follow, and the first taker would have the whole property. No cases on this point have been found, and the question is open. It is probable, however, that the Supreme Court will find some way of getting the undisposed of residue back to the grantor.

Gift by Will Where the Preceding Valid Legal Limitations do Not Exhaust the Fee

468. If the gift is by will, at law, and the preceding valid legal limitations do not exhaust the fee, the balance of property, whether realty or personalty, attempted to be disposed of by the void limitations passes to the residuary legatee, in the case of a specific bequest or devise, and if there is no residu-

² If there can be no future legal interests in personal property created by deed inter vivos, as to which see, §§92, 95, ante, the result is the same. The limitations are void, not because of the rule against perpetuities, but because they cannot be created in the method which has been attempted.

³ For an illustration of a common case of the application of this principle at law, see *Smith v. Townsend*, 32 Pa. 434 (1859).

No case in equity has been found in Pennsylvania. An example will illustrate the point: suppose a gift to A. in trust for X. and his heirs, and if he dies without issue to C. If dying without issue means indefinite failure of issue, the gift over is void and the whole interest remains in X. and his heirs.

⁴ No case on this point has been found.

⁵ For a discussion as to whether they can be created, see §§92, 95, ante.

ary devise or the gift is of a residue, there will be an intestacy.⁶

Gift by Deed Where the Preceding Equitable Limitations do Not Exhaust the Entire Property Transferred

469. Where the gift is by way of deed of trust, and the preceding valid equitable limitations do not exhaust the entire beneficial interest, and there is a subsequent remote limitation which is destroyed by the rule, there is a resulting trust of the undisposed of residue to the donor, his heir at law or next of kin as the case may be, according to the nature of the property. The rule only operates on the limitations which are void; it does not affect the trust.

Gift by Will Where the Preceding Valid Equitable Limitations Do Not Exhaust the Entire Property Bequeathed

470. When the disposition is by will, and the preceding valid equitable limitations do not exhaust the entire beneficial interest, there is a resulting trust of the property embraced in the void limitations to the residuary legatee, in the case of a trust of a specific bequest or devise, and where the trust is of a residue or there is no residue, there will be a resulting trust to the heir at law or next of kin, according to the nature of the property.⁷

Coggins' Appeal

471. In Coggins' Appeal⁸ there was a gift of the residue in trust for certain life cestuis que trustent, with gifts over, which the Supreme Court held were void under the rule against perpetuities.⁹ The auditing judge held that the property embraced in these future interests should be distributed under the intestate laws. On appeal, the Supreme Court said that

⁶ The law here is the same as in the case where the whole gift is void, as to which see §460, ante. In *Davenport v. Harris*, 3 Grant, 164 (1855), the equitable limitations were executed by the statute of uses, and the case became one of legal limitations. Lowrie, J., said there was a

reversion. He probably meant a residue.

⁷ According to the analogy of the law, see §460, ante. It is sometimes said there is an intestacy. This is a fallacy; see §151, ante.

⁸ 124 Pa. 10 (1889).

⁹ See §445, ante.

the estate must be distributed to the children having life estates, and then reinstated the decree of the auditing judge. The question as to the disposition of the property covered by the void limitation was not argued nor discussed. It is to be remarked that the heirs of the testator were also the life tenants, and whichever principle was adopted, the result would be the same. This is the first case on the point which has been found and the opinion of the Supreme Court is far from clear.

Johnston's Estate

472. In *Johnston's Estate*¹⁰ there was a devise to trustees for seventy-five years to pay the income subject to debts and legacies, on the first of each May during the period, among the children of the testator and children of a deceased child, and descendants of a more remote degree, in equal shares, per stirpes, and, at the end of seventy-five years, to sell the land and divide the proceeds among the children then living, and the issue of a deceased child. The court below, Stewart, P. J., affirmed, on appeal, and said that the limitation after seventy-five years was contingent and remote. As to this there can be no difference of opinion. The learned judge, however, concluded that the whole gift was void and distributed the estate under the intestate law. His reasons appear to be as follows:¹¹ that the only purpose which the testator had was to make an invalid gift; and his object was to control the disposition of his property beyond the period that the law allows, and for that reason, the whole scheme should fail; that it should also fail because of the circumstances that the two estates were not separable.¹² "That is to say, they are so related that upholding the one and avoiding the other would clearly defeat the main, if not the only, purpose of the testator in making the devise." It is not permissible, it is submitted, to say that because there is one invalid gift, that therefore another separable valid gift is to be destroyed.

¹⁰ 185 Pa. 179 (1898).

¹¹ See page 191.

¹² The position that the two limitations were inseparable will not be easily admitted, and it is difficult to see how the learned judge reached such a conclusion. His remarks on this subject are still more

inexplicable, in view of the opening sentences of his opinion, on p. 183, where he considers that there are two separate and distinct estates given, the terms of seventy-five years and the remainder, and that to determine the application of the rule they must be considered separately.

The conclusion of the learned judge, that the testator intended to violate the law, was, it is submitted, unwarranted. It is true that the heirs at law were the children of the testator, who were also the life tenants under the trust, and that with the remote limitations to the great-grandchildren cut out, there seems at first glance to be no difference between sustaining the particular estate and decreeing a resulting trust. There was actually a difference, however, because it is plain that all the beneficiaries of the trust were not the same persons as the heirs of the testator.¹² The notion that the rule applies because of the supposed illegality of the intention of the testator, has, unfortunately, worked itself into the law.¹ Mr. Gray² comments on and criticises this case. He points out that the New York cases cited by the learned judge turned on the peculiar provisions of the New York revised statutes, and that *Thorndyke v. Loring* was a case of a gift of an accumulated income at a remote period,³ and that the learned judge misunderstood those cases when he thought that they were authorities for the conclusion he reached. It seems as if this were the main source of objection to the case. The question is not whether the testator intended to violate the

¹² See language of the learned judge in the middle of p. 189 of the report.

¹ In *Goddard's Est.*, 198 Pa. 454 (1901), same will before the court in *Van Syckel's Est.*, 9 D. R. 367 (1900); s. c. 24 Pa. C. C. 241; *Penrose, J.*, in the court below said by way of dictum at p. 458, "The case is radically different from *Johnston's App.*, 185 Pa. 179, cited on behalf of the respondent, where the paramount object or 'scheme' of the testator being the accomplishment of a purpose transgressive of the rule against perpetuities, subordinate interests, created in furtherance of such scheme, which, standing by themselves, might have been perfectly valid, were also held to be void, as mere incidents or agencies of a frustrated purpose. Here there was no such 'scheme'; the paramount purpose of the donee of the power was to make provisions for her children, in accordance with what she

regarded as her right, and there was no deliberate or manifest intention to transgress the rule in the disposition directed when the estate so created shall respectively cease." It is submitted, however, that this language is unfortunate. The question whether the rule is violated can never depend on the distinction between the deliberate or other kind of intention of the testator. The rule destroys the intention in every case that it applies; there is no element of punishment in it because of the supposed guilty disposition of the testator in attempting to transgress the rule. This language shows the unfortunate result of the decision in *Johnston's Est.*

² *Rule Perp.*, 2 ed. (1906), §249b.

³ Similar, therefore, to the case of *Hillyard v. Miller*, 10 Pa. 326 (1849), where the whole gift was void.

rule,⁴ but whether the future interest created does violate the rule. Furthermore, the gift to the trustees for seventy-five years was utterly immaterial and of no weight. If the valid life estates to the children and the grandchildren extended beyond seventy-five years, as they very well might, the trustee would not have a sufficient legal title to carry out the trust and the court would direct the heirs at law to convey to the trustee such legal title as might be necessary. Since, therefore, the direction to distribute⁵ at the end of seventy-five years was void, the case stood just as if there were a gift in trust for the children, grandchildren, great-grandchildren, and great-great-grandchildren for the life of each. The gift would be valid as to children or grandchildren, and a resulting trust decreed *pro tanto* of the residue.⁶

Gerber's Estate

474. In *Gerber's Estate*⁷ there was a very lengthy and involved will. The testator gave his estate in trust, with directions to pay out of the income, certain legacies, etc., some of them to charities, and the balance of the income to be accumulated and divided with the principal. He then directed that after "the death of all my grandchildren, and the youngest grandchild living of my son A. has become twenty-two years of age," the principal⁸ should be divided among the lawful heirs⁹ of his son A. in equal shares.¹⁰ The testator

⁴ It was argued in *Moore's Est.*, 198 Pa. 611 (1901), that the principle of *Johnston's Est.*, 185 Pa. 179 (1898), applied to a case of an equitable life estate, and remainders to charities, which remainders were void under Act of 1855. Argument repudiated by the court.

⁵ Such a direction is a power enabling the trustee to create new equitable estates at a remote period. As to this, see §412, ante.

⁶ See remarks of Penrose, J., in *Echter-nacht's Est.*, 18 Pa. C. C. 143 (1896).

⁷ 196 Pa. 366 (1900).

⁸ On p. 366.

⁹ The gift here was to the heirs of A., who were ascertained at A.'s death, and the time for them to take was fixed by the arrival of the youngest grandchild of A. at the age of twenty-two. The heirs of A.

all stood and fell together. The limitation to the heirs of the son was contingent because to persons unascertained and was an equitable future trust by way of remainder, and consequently need not take effect immediately upon the termination of the preceeding particular estate. If this had been a legal remainder it would not have been remote, as the heirs of A. must have been ascertained, if at all, in time to take at the death of A. They would then have had a vested interest, the enjoyment of which would have been postponed by the other charges in the will and the rule would not have applied. See §343, ante.

¹⁰ The direction to accumulate was clearly void, see §653, post, even although a certain part thereof was to be paid to charities.

left to survive him one son, A., numerous grandchildren and great-grandchildren. The auditor concluded that the whole trust was void,¹ and awarded the entire estate to the trustee of the son. It does not appear from the report why there was a trustee of the son, nor what standing the trustee had in the case. In his conclusion as to the effect of the interest being remote the auditor involved himself in a very curious fallacy. He decided first, that the ulterior limitations were void, because remote, then, that the intervening charges were void because, he said, it would not do to permit the rule against perpetuities to be set at naught by permitting an invalid ulterior limitation to be sustained by valid intervening charges, which is the same thing as saying that if one fails, the other fails, which is the very question to which he was addressing himself. The rule against perpetuities only cuts out the particular limitation which violates the rule, and everything else remains. The auditor was evidently influenced by the fallacy that where there is an intention in one part of the will to violate the rule, the testator must be punished for his attempted violation of the law by having the whole settlement destroyed; a very harsh and unnecessarily severe application of the rule, and, it is submitted, totally unwarranted by reason or the common law and resting on the questionable decision in *Johnston's Estate*.² Was the limitation remote? This depends on the construction to be given to the word living. The learned auditor said that the word living, as used in the will, meant living at the time of distribution. Living might mean living at the death of the testator, in which event the time of distribution would be not later than twenty-two years after the testator's death. It might mean living at the death of A., in which event the distribution would be not later than twenty-two years after the death of A. It is clear, therefore, that the time of distribution depended on the construction to be given to the word living. That period was moved forward or backward, according to the time to which the word living should be construed to refer. How then was it possible to say that the word living

¹ Entirely overlooking the doctrine that a resulting trust could be decreed of the accumulating income and the other charges saved; see §643, post. The stat-

ute against accumulations does not violate the intention any more than necessary.

² 185 Pa. 179 (1898), stated §472, ante.

meant living at the time of distribution?³ An intention to violate the rule is not to be presumed, and when two constructions may be adopted the one which will prevent the application of the rule is to be preferred.⁴ The auditor destroyed the entire intention of the testator when it would have been just as easy to construe the word living as meaning living at the time of the death of the testator. Indeed, it seems that that is the more natural construction. It may be observed, however, that the auditor arrived at his conclusion on this point with great difficulty. The entire reasoning in this case is most unfortunate.⁵

Kountz's Estate

475. In *Kountz's Estate*, No. 1,⁶ the testatrix gave the residue of her estate to her husband in trust for her children and grandchildren, and then, after conferring certain active duties, directed him to pay the income as follows: (1) to her children while they should continue to live together, in equal shares, with certain immaterial discretionary power; (2) upon the death of a child leaving children but no husband or wife, such child's share of the income to be paid to his or her children; (3) should any child leave a husband or wife but no child, the share of the income to be paid to such husband or wife for life; (4) should any die leaving husband or wife and children, the share to be paid to the husband or

³ If living meant living at the death of the testator, the limitation over would not be remote if the youngest grandchild then living was one year old. It does not appear whether such was the fact or not.

⁴ Gray, *Rule Perp.*, 2 ed. (1906), §633.

⁵ It would have been possible, in construing this will, to have made "and" read "or", and thus make the limitations "after the death of all my grandchildren or when the youngest grandchild living," etc. The suggestion of the auditor, that the limitations in items 2, 5, 6, and 7 conflict with the intention that the limitation over was on the death of all the grandchildren living at the death of the testator, is hardly sustained after a careful examination of the words of the

items. It appears as if the testator provided for the contingency of the beneficiaries of this particular trust dying before the arrival of the time for the final distribution of the estate. It does not necessarily follow from that that the substituted children or grandchildren were to be benefitted beyond that period. If they were, the case would be the same, as they would take in time, and the fact that their estates extended into the forbidden period would be immaterial. The will is conflicting, but it is submitted that the construction suggested brings it within the rule against perpetuities and is, therefore, to be adopted. No construction possible will harmonize all the provisions of the will.

⁶ 213 Pa. 390 (1906).

wife and children; (5) should any die without leaving spouse or child, such one's share of the income and principal to go to the surviving co-heirs; (6) after the decease of the last of the immediate children, and after ten years from the date when the youngest grandchild should become of age, the principal of the whole estate to be divided among the grandchildren. The court below held that each grandchild in esse at the death of the testatrix took a vested interest subject to open and let in after-born grandchildren, and that the gifts to the grandchildren were not remote.⁷ On appeal, the Supreme Court held that the remainders to the grandchildren were contingent, basing the conclusion on the sixth clause of the will, and that the limitations to them were remote.⁸ This is a close case on the question of construction, and although some of the reasons advanced for the contingency of the gifts are open to objection, the conclusion of the Supreme Court on this point may be accepted; the learned judge, Potter, J., however, went on to say: "This period" (the period fixed for distribution) "was too remote, and the gift made to take effect at that time is void under the rule against perpetuities. That being the case, the antecedent particular estate would fail also, and the heirs at law of the testator are entitled to immediate possession," citing *Johnston's Estate*.⁹ The decision is most extreme. While the point appears to have been argued by counsel for the appellant, the learned judge paid no attention to the argument in his opinion. The case is plainly distinguishable from even *Johnston's Estate*, extreme as that case is. The particular estates were valid and the gifts over were clearly separable.

Summary of the Pennsylvania Cases

476. In these cases, from *Johnston's Estate*¹⁰ to *Kountz's*

⁷ This is clear. Each grandchild must be born before or nine months after the death of the last child of the testatrix, and on the death of the surviving child, the interests of the grandchildren would be postponed in possession by the ten years clause which would be void, see §449, ante; and by the existing estates of any surviving husband or wife of a child, which estates would be valid, as they were vested within the period prescribed by the rule. See §343, 345, ante.

⁸ If contingent, the remoteness of the gifts is clear, as they will not vest until ten years after the coming of age of the youngest grandchild, which latter event might be more than twenty-one years after the death of the last surviving child.

⁹ 185 Pa. 179 (1888), stated §472, ante, and *Gerber's Est.*, 196 Pa. 366, (1900), stated §474, ante.

¹⁰ 185 Pa. 179 (1898), stated §472, ante.

Estate,¹ the court has, it is submitted, overlooked the true application of the rule against perpetuities. The rule operates to destroy the intention, but is not to be applied to any greater extent than is absolutely necessary. The court should be astute to separate all limitations which can possibly be separated, and the question whether the testator deliberately intended to violate the rule can have no proper weight whatever. The court has, it is apprehended, made an unnecessarily harsh and severe application of the rule,² and has probably been influenced by the fallacious notion³ that the rule against perpetuities applies to a trust, whereas it applies only to the interest of each separate cestui que trust.⁴

¹ 213 Pa. 390 (1906), stated §475, ante.

² The attitude of the court in these cases is in strange contrast to the line of decisions noted in Part II sustaining the validity of the clause against alienation and the line of decisions noted Chap. 22, tending to sustain the validity of the trust of a fee. In those cases the court has gone to the uttermost limit in sustaining the intention of the testator to an extent

which, it is submitted, is against public policy, whereas, in the cases involved in the application of the rule against perpetuities, the court has swung to the other extreme and disregarded the intention of the testator to a degree entirely uncalled for either by any necessities of the rule, or by any principle of public policy.

³ Discussed §375, ante.

⁴ See §374, ante.

PART IV

THE RULE FORBIDDING THE IMPOSITION OF RESTRAINTS ON ENJOYMENT

- Chap. 20. Preliminary
- Chap. 21. Postponement of Enjoyment
- Chap. 22. Trust of an Absolute Interest
- Chap. 23. Discretion

CHAPTER 20

PRELIMINARY DISCUSSION OF THE RULE FORBIDDING THE IMPOSITION OF RESTRAINTS ON ENJOYMENT

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The Rule Forbidding the Imposition of Restraints on Enjoyment Discussed and Stated

485. The fundamental principles relating to the use and enjoyment of property have already been noticed,¹ as has also the principle of public policy² which is opposed to the creation of restraints on such use. This principle of public policy finds its expression, so far as gifts of property are concerned, in the rule of law which may be described as the rule forbidding the imposition of restraints on the enjoyment of property. Everyone who is sui juris is entitled to the unfettered control and enjoyment of all property in which he has the sole, absolute interest, subject only to the rules of law in force regulating that use.³ With the rules of law restricting such enjoyment, or with the stipulations which may be inserted in transfers for value having a like effect, we have no concern.⁴

¹ See §8.

² See §§11-14, ante; Lowrie, J., in *Phila. v. Girard's Heirs*, 45 Pa. 9 at 27 (1863); Ashman, J., in *Cooper's Est.*, 9 Pa. C. C. 356 (1891).

³ The incapacity of infants, lunatics, and married women may be referred to another principle of law and has nothing to do with the subject herein discussed.

⁴ See §§1, 8, ante.

The rule under discussion may be stated thus: all restraints imposed by a donor on the use and enjoyment of the property which he gives to the donee, are void. We shall consider later whether there are exceptions to this rule.

*The Rule Forbidding the Imposition of Restraints on Enjoyment
Distinguished From the Rule Forbidding Restraints
on Alienation*

486. Restraints on use and enjoyment have nothing to do with restraints on the right of alienation. It is true that property subject to such a restriction may be less marketable and bring a smaller price. It is, nevertheless, freely alienable in the absence of any restriction to the contrary. The right of alienation is the right to transfer property to another. The restrictions on use and enjoyment may apply without alienation, by the donee. These several incidents of ownership must be carefully distinguished.⁵ As the restrictions are against the policy of the law they are to be strictly construed, and no case has been found deciding that a restraint on one incident has any effect on the other. The right of enjoyment has, however, been confused with the right of alienation.

*The Rule Forbidding the Creation of Restraints on Enjoyment
Distinguished From the Rule Against Perpetuities*

487. It is perfectly clear that since the restraint must be aimed at the enjoyment of an interest which has already taken effect, no question can arise as to the application of the rule against perpetuities. A clause aimed at a restriction on the enjoyment of an interest not yet vested, would, of course, have no effect until the interest was vested, and the clause would fall with the interest if the latter violated the rule against perpetuities. When the interest has survived the rule against perpetuities, the question then arises, if there is such a clause, as to how far it is valid. The distinction between the two rules seems perfectly plain.⁷

⁵ See §4, ante.

⁷ See Gray, Rule Perp., 1 ed. (1886), §121, n. 1. In *Smith v. Townsend*, 32 Pa. 434 (1859), there was a devise of a lot, subject to the condition that the owner should not permit any building to be

erected on a certain part of the property or an alley to be opened through the court in which the dwelling-house was situate, with the proviso that in the event of failure to perform this condition, the premises were to go over to the trustees of a

*Who May Invoke the Application of the Rule Forbidding
Restraints on Enjoyment*

488. Where there is a clause restraining the use and enjoyment the question as to its validity can be raised only by the party entitled to the interest to which the clause is attached.⁸ No one else has any concern in the matter. In this respect the rule differs from the rule against perpetuities. Where the latter rule applies it is the duty of the court to destroy the invalid interests whether anyone interested complains or not. This distinction is very clearly brought out by a consideration of the cases arising under the statute against accumulations.⁹ If there is a direction to accumulate and a gift of the accumulated fund, which is dependent on the accumulations, and under the rule against perpetuities the gift is void, it is the duty of the court to prevent the accumulations from taking place whether the parties entitled complain or not. If, however, there is a direction to accumulate engrafted on a vested interest, the direction violates the rule forbidding restraints on enjoyment and it is not proper for the court to stop the accumulations unless the party entitled to the income so requires.

Form in Which the Attempted Restraint May Appear

489. The attempted restraint on use and enjoyment appears in several forms, and they all express the thought common to many over-fond parents, that their offspring should be protected from themselves and the world even after reaching the age of discretion prescribed by the law. The parent seeks to prolong the infancy of his child and keep him in leading-strings long after he is a man, and in order to accomplish this provides that the donee shall not come into the control or use of his property until he has reached some age beyond twenty-one, such, for instance, as twenty-five, twenty-eight, thirty, or the like. This is the clause postponing enjoyment and is discussed in Chapter 21. The donor may, in his endeavor

charity. The court held that the limitation over could only take effect as an executory devise, and was void as such because within the rule against perpetuities. This being a gift of property, it is apprehended that the restriction was

void within the rule forbidding the creation of restraints on enjoyments.

⁸ Dictum, Penrose, J., in *Rhodes' Est.*, 147 Pa. 227 at 231 (1892); see this case stated in §344, ante.

⁹ See Chap. 25 on Accumulations.

to protect the donee from the consequences of his own stupidity and folly, put the property in the hands of trustees and endeavor to restrict the participation by the donee in the benefit of the property to the income which the trustees may pay him. This proviso presents the case of a trust of an absolute interest and is discussed in Chapter 22. An attempt may also be made in the case of a trust to limit the benefit which the cestui que trust may receive to such extent only as the trustees may, in the discretion vested in them, think fit to give him. This is a clause of discretion in the trustee and is discussed in Chapter 23.

Conditions in Restraint of Marriage

490. The case of a condition or clause of restraint on marriage depends on a somewhat different principle. The act sought to be restrained has nothing to do with the use and enjoyment of the property. The donor wishes to prevent the commission of a certain act, and in order to accomplish that purpose imposes on the gift a clause which deprives the donee of the property when the act specified takes place. The propriety of the restraint, from the point of view of public policy, depends, it is apprehended, on the nature of the act sought to be restrained.¹⁰

¹⁰ For a recent case involving a condition in restraint of marriage see *Holbrook's Est.*, 213 Pa. 93 (1905).

CHAPTER 21

POSTPONEMENT OF ENJOYMENT

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Preliminary Discussion

495. One of the most frequent forms in which the attempt to impose a restriction on the use and enjoyment of property appears, is the clause postponing the time of payment beyond the arrival of the donee at the age of twenty-one.¹ Such a clause is utterly void at common law,² and the donee can have the property upon arriving at twenty-one, notwithstanding the direction. While this is the admitted principle of the common law, the matter is in doubt in Pennsylvania. The cases will now be discussed.

¹ See §489, ante.

et seq.; Restraints on Alien., 2 ed.

² Gray, *Rule Perp.*, 2 ed. (1906), §118a, (1895), §§112a-114.

Kay v. Scates

496. In *Kay v. Scates*³ the exact words of the will, unfortunately, are not given. The court expressly refused to decree a conveyance asked for by a cestui que trust who had not arrived at the age of twenty-five years. Mr. Justice Strong said,⁴ "It is true that two of the complainants have not yet arrived at the age of twenty-five, and until then the testator has postponed their full enjoyment of the income of the property. Until then a discretion is given to the trustees to determine what amount they shall receive. The full right to a present beneficial enjoyment is not yet theirs. But when they shall reach that age, they will stand in the same position with their brother, the other complainant."⁵ The remarks of the judge were dicta, as the two sons who had not reached twenty-five did not ask for a conveyance.

McCullough v. Fenton

497. In *McCullough v. Fenton*⁶ the testator gave all his real estate to his two sons, John and Elijah, "as hereafter limited, that is to say, as soon as Elijah arrives at twenty-two years, they shall have full possession and not sooner," with a further proviso that if John or Elijah should die without lawful issue before coming into possession of the land, then their share of the land should go to X., et al. Elijah died under twenty-two. It was held that he took a vested fee simple estate in the moiety of the land which was divested by his death under twenty-two without issue, and which went over to X., et al. in fee simple. This case, therefore, is not an authority for the validity of the clause.

Butler v. Butler

498. In *Butler v. Butler*⁷ there was a gift in trust to hold and invest until a son should arrive at the age of twenty-eight years. The son attained the age of twenty-one, and

³ 37 Pa. 31 (1860).

⁴ At p. 39; the reporter at top of p. 32 says the age specified was twenty-six.

⁵ It seems that the discretion was not as to payment at twenty-five but as to the amount to be advanced to each cestui que trust until reaching twenty-

five. There were, therefore, in this case, two provisions restraining the absolute use of the property. As to the clause of discretion, see §537, post.

⁶ 65 Pa. 418 (1870).

⁷ 9 Phila. 269 (1873), Supreme Court at Nisi Prius.

applied by bill in equity to have the trust estate transferred to him. The bill was dismissed as to the principal, Sharswood, J., saying in a very short and unsatisfactory opinion that the trust until twenty-eight was lawful and must be sustained.⁸ This is a square decision in favor of the validity of the clause.

McCall's Appeal

499. In *McCall's Appeal*⁹ there was a trust of \$2,000 to pay the income to A. for life, and, upon his decease, to B. until he, B., arrived at twenty-five years, and on his arriving at twenty-five years, to pay him the whole principal with the accumulations, with a limitation over on B.'s death under twenty-five without issue. B. was thirty-one years old at the death of the testator. B. died at the age of thirty-seven, living A. A. then died, and the principal of the trust fund was claimed by the executors of B. and by the parties entitled under the limitation over upon the death of B. under twenty-five. It was held that B. took a vested estate, and that the fund should be awarded to his executors. If A. died, living B. under twenty-five, the question would have been raised as to the validity of the clause of postponement.

Varner's Appeal

500. In *Varner's Appeal*¹⁰ the gift was in trust to pay the income to A. until she should arrive at the age of twenty-five years, and then convey the principal to her absolutely: The case came up on partition proceedings, A. being a minor, and the court awarded her share to her trustees and not to her personally, saying that she had not attained the age when she would be entitled to take the property out of the hands of her trustees. It does not appear, therefore, whether the court thought twenty-one was that age or whether they would sustain the trust until she reached twenty-five.

Eberly's Appeal

502. In *Eberly's Appeal*¹ the testator bequeathed his residuary estate upon trust for his son, directing the trustee to educate the

⁸ See also remarks of Thayer, J., in *Dimond v. Dimond*, 9 Phila. 215 (1874).

¹⁰ 87 Pa. 422 (1878).

¹ 110 Pa. 95 (1885).

⁹ 86 Pa. 254 (1878).

son during minority; and on his arriving at majority, to pay him \$500 a year until he reached twenty-five, and then, in the discretion of the trustee, if the son was competent, etc., to pay the son the principal; if not, to pay him \$500 a year during his life, and upon his death to pay the principal to his heirs. The son upon reaching twenty-one applied only for the accumulations of income² and no question was raised as to the validity of the clause postponing payment of the principal until twenty-five.³

Shallcross's Estate

503. In Shallcross's Estate⁴ the testatrix gave one-half of her residuary estate in trust for the minor children of a son, naming them, until they should respectively arrive at lawful age, and, by a codicil, directed that the property should be held in trust until they should severally arrive at twenty-five years. It appears from the opinion of Potter, J., in the Supreme Court, that one of the children died at the age of twenty-two, and that her share of the estate was claimed by her next of kin under the intestate laws. The decree of the court below awarding this share to them was affirmed on appeal. If this was all there was in the case the remarks of the court as to postponement of enjoyment were dicta, as, apart from the clause, the interest was vested, and upon death under the age prescribed the legacy is to be paid to the personal representatives.⁵ Mr. Justice Potter said that the subsequent provision of the codicil postponing enjoyment until twenty-five was void as contrary to the rule against perpetuities, and then said that the desire of the testator to postpone payment until attaining twenty-five was against the rule of public policy forbidding restraints on the use or disposition of property in which no one but the beneficiary has any interest, a confusion of the two rules totally unnecessary but often made.

Hallowell's Estate

504. In Hallowell's Estate⁶ the testator gave what the court

² See §663, post, as to this point.

⁴ 200 Pa. 122 (1901).

³ This case amounted to a limitation over to the heirs of the son after the trustee refused to exercise the discretion in favor of the son as to the principal, as to which see §537, post.

⁵ See Middleton's Est., 212 Pa. 119 (1905).

⁶ 33 Pa. C. C. 596 (1906), a. c. 16 D. R. 17.

construed to be a direct gift of one hundred dollars, with a postponement of the time of payment to twenty-five years. The legatee having reached the age of twenty-one, but not the age of twenty-five, petitioned for an order on the executor to forthwith pay over the legacy. The court made the order prayed for. Lamorelle, J., delivered the opinion and cited *Shallcross's Estate*,⁷ without observing that the remarks in that case were dicta. The case of *Butler v. Butler*⁸ apparently was not called to the attention of the court. This case is in strict conformity with the common law principle, and is probably the only case in Pennsylvania, excepting *Butler v. Butler*, squarely deciding the point.

Pennsylvania Law as to Validity of Clause of Postponement

505. It appears from these cases that the law in Pennsylvania is in considerable doubt. The validity of the clause of postponement beyond twenty-one is strongly supported by the dictum in *Kay v. Scates*,⁹ and by the express decision in *Butler v. Butler*,¹⁰ and *Varner's Appeal*¹¹ is doubtful. *McCullough v. Fenton*,¹ *McCall's Appeal*² and *Eberly's Appeal*³ can all be explained on other grounds and none of them support the validity of the clause. In a number of other cases cited in the note the clause was present, but no question as to its validity was raised, and it seems to have been acquiesced in as valid.⁴ The dictum in *Shallcross's Appeal*⁵ is directly in accordance with the common law and is supported by an earlier dictum.⁶ The point is squarely ruled in favor of the

⁷ 200 Pa. 122 (1901), stated §503, ante.

⁸ 9 Phila. 269 (1873), stated §498, ante.

⁹ 37 Pa. 31 (1860), stated §496, ante.

¹⁰ 9 Phila. 269 (1873), stated §498, ante.

¹¹ 87 Pa. 422 (1878), stated §500, ante.

¹ 65 Pa. 418 (1870), stated §497, ante.

² 86 Pa. 254 (1878), stated §499, ante.

³ 110 Pa. 95 (1885), stated §502, ante.

⁴ In *Doebler's App.*, 64 Pa. 9 (1870), there was a proviso postponing the possession by the son until twenty-two. The son had passed twenty-two so the point was not raised for decision. In *Quin's Est.*, 144 Pa. 444 (1891), there was a direction to distribute at twenty-five and at thirty; there was a clause as to twenty-five and thirty years in *Handy's*

Est., 167 Pa. 552 (1895); in *Markle's Est.*, 187 Pa. 639 (1898), there was a trust to pay the principal to the beneficiaries on arriving at the age of forty years. For a case of a direction to accumulate until twenty-three, see *Vastine's Est.*, 190 Pa. 443 (1889).

⁵ 200 Pa. 122 (1901), stated §503, ante.

⁶ *Lowrie, J.*, in *Phila. v. Girard's Heirs*, 45 Pa. 9 at 27 (1863), citing with approval those cases where a vested legacy was given an infant, with a trust for accumulation until he should reach twenty-five or other over-age period, and in which it was held that such direction was void for all beyond lawful age, as repugnant to the interests given.

common law principle for the first time in *Hallowell's Estate*.⁷ In this condition of the authorities, particularly in view of the earlier decisions, it is impossible to venture any definite statement as to the law. On principle the clause is unquestionably void.

Gift Over Contingent Upon Arrival at a Certain Age

506. If the gift is contingent upon the arrival of the donee or a third person at the required age the rule does not apply. The proviso in such case is not a postponement of the enjoyment by the donee of his interest because he has no interest until the condition precedent has been fulfilled.⁸ It is often a difficult question of construction to determine whether there is a vested or a contingent gift.⁹ A proviso divesting the estate upon the arrival of the donee or a third person at a certain age is valid.¹⁰ In like manner, the testator may make a legacy payable at a certain time in the future, and if the gift is contingent, on the arrival of the time it is valid, providing it does not violate the rule against perpetuities, even though the devisee reaches twenty-one before the time fixed.¹ This is the same as the case of a gift of the whole property upon arriving at a certain age. Such cases are rare, except when the subject matter is personal property.

Postponement for a Class

507. The donee must have the sole interest in the property in order that he may disregard the clause of postponement. It is a principle of the common law that any clause of postponement is valid when the clause is in favor of another interest. It may be that this idea was introduced into the law by the peculiar doctrines which governed the vested remainder. A vested remainder is an interest vested in prae-

⁷ 33 Pa. C. C. 596 (1906); s. c. 16 D. R. 17, stated §504, ante

⁸ For example, a gift to A. when B., a living person, shall arrive at the age of twenty-five; item 5, of will in *Conrow's App.*, 3 Penny. 356 at 357 (1833).

⁹ The provisions of the will and codicil in *Hallowell's Est.*, 33 Pa. C. C. R. 596 (1906), s. c. 16 D. R. 17, illustrate this

question of construction.

¹⁰ For example, a gift to A. in fee, and when B., a living person, shall arrive at twenty-five years, to X. in fee. To A. until he shall arrive at twenty-five years, then to C. and his heirs.

¹ *Hemphill v. Hurford*, 3 W. & S. 216 (1842).

senti, but with the right of enjoyment postponed until the termination of the preceding estate. The common case of a remainder to a class is another instance of the application of this principle. The gift to each member of the class is postponed in enjoyment until the class closes, which postponement is valid, as the class may increase, and thus other interests may be introduced.²

Consequences of Upholding the Validity Clause of Postponement

508. If the Supreme Court should ignore the dictum in *Shallcross's Estate*,³ and revert to the law laid down in *Butler v. Butler*,⁴ several questions will arise. For how long is the clause of postponement valid? Will the court adopt the period prescribed by the rule against perpetuities, and, if they do, from what time will the period begin to run,—from the time of the creation of the interest, or from the time of the arrival of the donee at twenty-one, or from the time fixed for the payment? This involves the same question discussed at another point.⁵

² For a consideration of this doctrine in connection with the application of the rule against perpetuities, see §449, ante.

³ 200 Pa. 122 (1903), stated §503, ante.

⁴ 9 Phila. 269 (1873), stated §498, ante.

⁵ See §526, post.

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CHAPTER 22

TRUST OF AN ABSOLUTE INTEREST

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Preliminary Discussion

515. In this chapter we shall discuss the second form in which the attempted restraint on enjoyment appears.¹ This is the case where the donor creates a trust of the absolute interest which he gives the donee, the intention apparently being to prevent the donee from having full control and use of the property. If the trust can remain against the will of the cestui que trust it is a restraint on his use and enjoyment.

General Principle as to Validity of the Trust of an Absolute Interest

516. The general principle is that a donor may not fetter an absolute gift with a trust.² Such a trust is a restraint on

¹ See §489, ante.

² By absolute gift is meant a fee simple in real estate or an absolute interest in personal property. No distinction is drawn in this chapter between the two kinds of property

the donee's use and enjoyment of his property, because he is thereby deprived of the use and enjoyment of the legal title, and since the property is his absolutely he is entitled to the whole, legal as well as equitable.³ The cestui que trust may terminate the trust and have a conveyance of the legal title at his pleasure, and it is entirely inadmissible to rely on the intention of the donor, because that intention is against the law and cannot be carried out against the objection of the cestui que trust.⁴

Preliminary Discussion of Law in Pennsylvania as to Trust of an Absolute Interest

517. There is a great weight of authority in Pennsylvania in favor of the right of the cestui que trust to terminate the trust.⁵ There are, however, a number of recent cases which seem to countenance the proposition that a trust of an absolute interest is valid even against the objection of the cestui que trust. These cases will now be examined.⁶

³ The student will observe that the question is not whether the trust can be created; that it can be is beyond question. The donor can make a separation of the absolute beneficial interest from the legal title by the use of appropriate words. The question is whether that separation can remain against the objection of the cestui que trust. *Williams v. Toser*, 185 Pa. 302 (1898), is an illustration of such a trust remaining with the consent of the cestui que trust.

⁴ Where there are two or more cestuis que trustent they must all unite in order to terminate the trust.

⁵ See remarks of Gibson, C. J., in *Hillyard v. Miller*, 10 Pa. 326 at 338 (1849); *Penna. Co. v. Price*, 7 Phila. 465 (1870), grounds of decision open to objection as to application of the rule against perpetuities; *House v. Spear*, 1 W. N. C. 34 (1874); *Stevenson's Est.*, 18 Phila. 151 (1878); dictum, *Penrose, J.*, in *Moss's Est.*, 11 W. N. C. 306 at 307 (1882); *Willard v. Davis*, 3 Penny. 86 (1882); *Rodrigue's App.*, 22 W. N. C. 358 (1888); dictum, *Bucher, J.*, in the court below in *Dull's Est.*, 137 Pa. 112 at 115 (1890); *Robin-*

son's Est., 149 Pa. 418 (1892), see remarks of auditor in the court below, at p. 428; the cases he cites are, however, not in point; dictum, *Ashman, J.*, in the court below in *Cooper's Est.*, 150 Pa. 576 at 579, 580, (1892); *McCune v. Baker*, 155 Pa. 503 (1893); *Reilly's Est.*, 190 Pa. 509 (1899). In many of these cases the court relied on the fact that the trust was dry. It is submitted that such ground of decision is unimportant, and the rule is the same whether the trust is dry or active. The point is that there is a restraint on an absolute interest. If the subject matter is real estate and the trust dry, the title is at once in the cestui que trust, whether he has had an absolute interest or not. If it is active he can call for a conveyance if he has a fee. If the subject matter is personalty he can have a conveyance if he has an absolute interest, and if he has a less interest he cannot have a conveyance whether the trust is dry or active. See, however, *Bringinghurst v. Cuthbert*, 6 Binney, 397 (1814).

⁶ The cases as to the validity of the clause against voluntary or involuntary

Boies' Estate

518. In *Boies' Estate*⁷ the testator gave the residue "to my son H., to my daughter M., to my daughter E., and my son Matthew, to be equally divided between them on the following conditions." Then as to the share of Matthew, he provided: "The share going to my son Matthew shall be held in trust by my son H. My son H. shall pay to my son Matthew the income from his share in quarterly payments each and every year during his natural life, and my son H. may, in his discretion, in case my said son Matthew shall reform and abstain from the use of intoxicating drinks for two years, pay to him, my said son Matthew, from three thousand to five thousand dollars to enable him to engage in business." By a codicil the testator further directed as follows: "I desire to have it known and understood by all interested in my last will and testament, and so I will, that it is my intention that my children surviving me, to whom I have left property in trust for their children, shall have the free use and benefit during their lives of the income of such trust, without the necessity of accounting to their children for such income, and that they shall have the power to sell and reinvest the principal at their discretion, in such manner as shall in their judgment best preserve the principal sum for their heirs. Nothing herein, however, is to affect the original provisions of my will concerning my youngest son Matthew." Matthew was dead, and the question was whether the executor under his will was entitled to Matthew's share in his father's estate. The court said that the legatees under Matthew's will were entitled to receive Matthew's share; that the share of Matthew was not cut down to an equitable life estate, but

alienation when attached to an equitable fee, discussed §§243, 251, ante, should be considered in this connection. The principle to be applied seems to be this: if a trust of a fee is invalid against the cestui que trust, then it must necessarily follow, since a spendthrift trust is only an ordinary trust with a clause attached, that a spendthrift trust of a fee will have no greater effect. The clause forbidding involuntary alienation is clearly invalid at common law when attached to a fee; see §218, ante. If valid at all, it is valid only in equity; see

§§243, 251, ante. If the cestui que trust can have a conveyance of the legal title and thus destroy the equitable interest apart from the clause, then the clause must fall with the termination of the trust. This view of the subject does not appear to have been called to the attention of the Supreme Court, and it must be confessed that the cases are somewhat stronger in favor of sustaining a spendthrift trust of a fee than in favor of sustaining a simple trust of a fee.

⁷ 177 Pa. 190 (1896).

was vested in him subject to the trust created for his protection and benefit for life, and that he had a right to dispose of the corpus as he did. The remarks as to the effect of the trust were dicta, as the case did not arise in Matthew's lifetime. The dictum in this case may be said to be the origin of the notion that a trust of an absolute interest can remain as against the objection of the cestui que trust.⁹

Krebs's Estate

519. In Krebs's Estate⁹ the testator by his will directed as follows: "It is my will that after the death of my wife, * * * all the property, real and personal, then left by her shall be divided in equal parts or shares between my children, with the condition that the money loaned to G., (a son,) shall be deducted from his share, and with the condition that G. shall receive only the interest of his share, or as much as in times of sickness or accident my executor will give him to meet his wants." Partition proceedings were had in the estate, and the share of G. was allotted to a trustee under the trusts in the will. The case came up on a petition to set aside the decree in partition appointing the trustee. The petition was dismissed and the Supreme Court affirmed the decision on the opinion of the court below.¹⁰ The learned judge of the court below¹¹ said, "All the authorities go to show that there may be an absolute beneficial estate consistently with a temporary or continuous trust. The test of the validity of a trust is a lawful purpose legally declared, and its duration measured by the accomplishment of such purpose." The learned judge cites no cases which sustain his position, and up to that time no such decision had been rendered in Pennsylvania. It is believed

⁹ This case is important, as it seems to be the first clear statement, although by way of dictum, of the notion that the donor can give an absolute interest and then provide that the estate shall be held in trust during the life of the first taker. Traces of this notion are to be found in the remarks of the court in some earlier cases, e. g., Conrow's App., 3 Penny. 356, Clark, J., at 363, 364 (1853); Marshall's Est., 147 Pa. 77 at 84 (1892); Cooper's Est., 150 Pa. 576, Paxson, C. J., at 583 (1892).

⁹ 184 Pa. 222 (1898).

¹⁰ The judge of the court below, at p. 223, said that the real nature of the proceeding was to have the trust declared executed. It is apprehended that the learned judge meant that the proceeding was to have the legal title conveyed; see p. 226. The better practice probably is to present a petition for a decree directing the conveyance of the legal title.

¹¹ Hawkins, P. J., at p. 224.

that the learned judge had in mind the thought that if the duties were active the statute of uses did not apply, and then concluded that the trust was therefore valid against the cestui que trust. The premises were correct, but the conclusion did not follow. This case was referred to by Penrose, J., in *Bouvier's Estate*,¹ as "illustrating the well-settled principle that where one part of a will gives an absolute estate and a subsequent part shows unequivocally that a less interest is intended (as by a direction to pay income for life with legal limitation over), the gift will be reduced accordingly." The language quoted by Penrose, J., is contained in paragraph 1 of the syllabus, and is quoted by Hawkins, P. J., from the language of Strong, J., in *Sheets' Est.*,² and was, it is apprehended, inapplicable to the question under discussion,³ which is whether a trust of an absolute interest can remain against the will of the cestui que trust.

Frantz v. Race

520. In *Frantz v. Race*⁵ the testator gave his farm to his son John, upon the events which happened, with subsequent directions as follows: "The title * * * to be and remain in the hands of my executors who are to take charge of said farm at any time when the said John Frantz lets the farm, or income thereof is wasted, and the executors to take charge of the farm and pay the said John Frantz the income or profits therefrom." On a case stated to determine the marketability of the title on an agreement by the son to convey, the widow being dead, it was held that John's title was unmarketable. The court said that there was no force in the argument that because there was no devise over at John's death he must take more than a life estate and that they had not reached the point when it was wise or necessary to determine to whom the land might go at his death or what estate he took.⁶ Since there were active duties the statute of uses did not apply, and John did not have the legal title to convey until he had terminated the trust. The decision, therefore, is correct, but the language of the court is far from clear.

¹ 28 Pa. C. C. 266 at 267 (1903).

² 52 Pa. 257 at 263 (1866).

³ See §522, n. 7, post.

⁴ 205 Pa. 150 (1903).

⁵ As John could take only one of three

estates in such a case, an estate for years, an estate for life or an estate in fee, there seems to be no insurmountable difficulty in the court deciding which one of the three he took.

King's Estate

521. In *King's Estate*⁸ the testator gave one-third of his estate in trust for his son for life, the income "to be paid to him directly, and not to be subject to his debts or liabilities or any judgment or decree of any court liable for any costs thereon, and after the decease of my son Alexander King, to grant, convey and assign the said property and principal to the children of my said son Alexander, or in case of the death of his said children before their father, then to the heirs of said deceased child or children," and by a codicil he revoked the gift in trust for his son and directed his executors to pay the wife and children of the son not less than \$1,500 per annum, and not more than \$5,000 during the life of the wife and son, and upon the death of both, the one-third share to go to the children. The case arose upon exceptions to the adjudication, and the report is far from clear as to the exact point involved. The learned judge in the court below, Hawkins, P. J., referred to *Krebs's Estate*, and reiterated a number of the remarks he had made in the course of his opinion in that case. It is difficult to see how any of them upholding the validity of the trust of an absolute interest as against the cestui que trust, were in point. In this case there was a plain life estate with limitations over to the children, and under no principle of law could the life cestui que trust receive the corpus of the estate.¹ It is apprehended that the learned judge overlooked the distinction between a trust for life with a gift over of the principal, and a trust in fee with a proviso that a trust should remain during the life of the first taker, two entirely different cases and depending on different principles of law so far as the right of the cestui que trust is concerned.²

Shower's Estate

522. In *Shower's Estate*³ the testator directed that after the death of his wife his estate should be divided equally

⁸ 210 Pa. 435 (1904).

¹ Some difficulty was raised in the court below because the trust was to last during the life of the son, who was not to receive any benefit under the trust. The learned judge thought it necessary to show that the son had an interest in the estate, which was totally unnecessary because,

as he himself said, a trust *per autre vie* is just as valid as a trust for the life of the cestui que trust. The stress which was laid on this simple point is somewhat difficult of comprehension.

² See this case discussed as to accumulations, §667, post.

³ 211 Pa. 297 (1905); see also §275, ante.

among his children, the share of certain of the children to be received by a trustee to invest the same, and he further directed the trustee "so to control the shares of my three * * * children * * * that they * * * may enjoy the interest thereof only, but in no way impair or diminish the principal." There was no gift over. The widow was dead, and upon the audit of the trustee's account the children claimed that they were entitled to receive the principal of their respective shares of the estate.⁴ The court below awarded the estate to the trustees under the trusts of the will, and, on appeal, the Supreme Court affirmed, Mr. Justice Mestrezat delivering the opinion of the court. The learned justice, after an elaborate discussion, came to the conclusion that the testator intended that the children should enjoy only the income of their shares;⁵ that the testator had explicitly disclaimed the intention of giving the estate to the children by declaring that they could enjoy the interest only and in no way diminish the principal, and the fact that there was no limitation over of the principal was insufficient to control the quantum of the estate in the *cestui que trust*.⁶ The learned judge then relied on the fallacy that the creation of a trust furnished a basis for an inference of an intention to cut down the abso-

⁴ On the ground, as stated by the learned judge in the Supreme Court, at p. 300, that the trust was dry or executed. This language is pertinent only in considering the application or non-application of the statute of uses. Unfortunately the report is silent as to the nature of the subject matter of the trust. The right of the *cestui que trust* to have the legal title does not depend on the fact that the trust is dry, but on the fact that he has an absolute interest, and when he has that, the activity of the trust is immaterial. See the language of the learned judge on pp. 301 and 303.

⁵ This was too plain for comment. The question was whether the intention could be carried out.

⁶ The learned judge said, at p. 303, "We concede the rule invoked by the appellants that a gift of the income of an estate with no limitation over of the prin-

cipal is an absolute gift of the property or fund itself. Its application, however, in any particular instance, necessarily depends upon the fact whether the testator has employed language in a subsequent part of his will which renders the rule inoperative. Such is the case here." This statement begs the question at issue, because the point is that the rule applies where there is no gift over of the principal and its application cannot be evaded by any intention of the testator that it shall not apply, but only by some words limiting the principal over. Its non-application, therefore, cannot depend upon whether the testator has employed language in the subsequent part of his will which renders the rule inoperative, unless that language amounts to a limitation over of the principal, and that there is no such limitation is the premise on which the learned judge founds his reasoning.

lute estate,⁷ and also on the notion that such a trust discloses an intention to create a spendthrift trust.⁸ It is appre-

⁷ This notion, it is believed, has sprung from a misunderstanding of a well-settled principle of construction, which, however, is to be applied to a state of affairs other than that presented by the creation of a trust. The principle in question is well stated in Jarman, Wills, 6th Amer. ed. (1893,) Vol. I, Chap. 15, p. 473, as follows: "if a testator in one part of his will gives to a person an estate of inheritance in lands or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devise or legatee to take a life interest only, the prior gift is restricted accordingly." This is the passage quoted by Mr. Justice Strong in *Sheets' Est.*, 52 Pa. 257 at 263 (1866). What the doctrine means is this: on the whole will it appears that the testator did not intend to give a fee, because his intention to give a fee, although disclosed at one point, is counteracted by a subsequently disclosed intention to give a less estate, and therefore, on the whole will, it must be said that a less estate only is devised. The rule has reference only to a case where there is a repugnancy or inconsistency in the provisions of the will. No such repugnancy is presented by the creation of a trust; *Agnew, J.*, in *Ivory v. Burna*, 56 Pa. 300 at 304 (1867), said, "A trust is not contradictory to the estate, but a mere qualification of its use, and only establishes a new and consistent relation but does not cut down the fee simple which was granted." See also language of *Clark, J.*, in *Shalters v. Ladd*, 141 Pa. 349 at 357 (1891); *Bellas's Est.*, 176 Pa. 221 (1896). *Jeremy's Est.*, 178 Pa. 477 (1896). The first trace of this fallacy which has been found is in *Nevins's Est.*, 192 Pa. 258 (1899). In that case the testatrix gave real and personal property in trust, with separate provisions as to the real estate and personal property. The provision as to real estate was ambiguous. As to the personal property, there was a

plain life estate. The court said, in an opinion by Mitchell, J., that the limitation of the interest in personal property to a life estate indicated an intention that the interest in the real estate should also be a life estate, and that, therefore, the Act of 1833 did not apply, there being other words in the will which indicated an intention to pass an estate less than a fee. The learned judge, in delivering the opinion of the court at p. 261, said, "The first notable observation on this clause is that there is no direct gift at all to the devisee, but only a devise in trust for her. While not in itself conclusive, this suggests at once an intent not to give the fee, else why interpose a trust? The most ignorant property-owner knows the difference between owning a house himself and having the use of it under a trust, and if this testatrix meant to give the full ownership in fee, there is no purpose disclosed in her will which should have prevented the easiest and most natural way of doing it by direct gift." There is, it is true, a practical difference between an estate in trust and an estate at law, which practical difference lies in the necessity, on the part of the cestui que trust, of dealing with the trustee. The difference, however, does not lie in the quantum of the estate. Perhaps the learned judge had in mind the thought that a trust would of itself be a bar to the cestui que trust's obtaining complete possession of the property when he had a fee simple estate, or, in other words, that a trust of a fee was valid. The same estates may be created in equity as at law. There is no difference in the quantum of the estate between legal and equitable limitations. It is difficult, therefore, to see how there can be any inference drawn as to the quantum of the estate from the circumstance that the limitation is equitable instead of legal.

⁸ As to this point, see §276, ante.

hended that the real point in the case was this: did the testator intend to give a life estate to the children for whom he created the trust, or did he intend to give a fee and make a trust of that fee for life? It is submitted that the plain import of the words was that the children should have an absolute estate, and that the direction that they should enjoy the income only was utterly void as a restraint on that estate. The only escape from the dilemma was the conclusion that the children took life estates. Did they take life estates? It appeared that the testator left other children. If, therefore, these particular children only took life estates, there would be a resulting trust of the principal after their death to the heir at law or next of kin, which would result necessarily in increasing the share of the other children. As the testator plainly indicated that all his children should share equally, it is submitted that a construction giving these children a life estate does far more violence to the intention of the testator than would a construction giving them their shares absolutely. This case follows closely the principle laid down in *Krebs's Estate*,⁹ sustaining a trust of an absolute interest against the will of the cestui que trust.¹⁰

Spring's Estate

523. In *Spring's Estate*¹ the testatrix gave a part of the residue of her estate to the children of a deceased daughter, naming them, their heirs and assigns forever, subject to certain conditions; then followed a proviso appointing a trustee as to these shares; the trustee to have the sole control to collect the income and pay thereout, at her discretion, to the beneficiaries, such sums as she might think necessary, with power in the trustee to terminate the trust as to any one or all of the beneficiaries, at such time as she might think it to the best interest of the beneficiaries or their heirs, with no limitation over of the principal. One of the grandchildren of the decedent, having attained the age of twenty-one, presented a petition to have the trusts of the will declared

⁹ 184 Pa. 222 (1898), stated §519, ante.

¹⁰ There was a petition for a citation in the same estate, the nature of which is not stated, in *Shower's Est.*, 30 Pa. C. C. 601 (1904), in which, apparently, a similar question was raised.

¹ 216 Pa. 529 (1907). As to the question of accumulations in this case, see §677, post.

at an end. The Supreme Court held that the petition should be dismissed. The decision was clearly correct, as there were several cestuis que trustent, and the trust could not be terminated unless all united in the application. This ground of decision was overlooked by the Supreme Court, and Mr. Justice Elkin, in delivering the opinion, rested the case on grounds which tend to sustain the proposition that the cestui que trust cannot terminate a trust of property in which he alone has an absolute interest. The learned judge said that it was the unquestioned law of the state that a benefactor has power to restrict the enjoyment of his bounty through the medium of a trustee during the life of a beneficiary, citing *Rife v. Geyer*.²

Law in Pennsylvania as to the Validity of a Trust of an Absolute Interest

524. It appears, therefore, that the overwhelming weight of authority sustains the proposition that where the cestui que trust is the only person interested and is entitled to the entire property he can terminate any trust thereof which may have been created.⁴ There appears to have been a vague notion to the contrary cropping out in some of the cases as far back as 1853,⁵ and culminating in the dictum in *Boies' Estate*.⁶ In *Krebs's Estate*⁷ it was first decided that a trust of an absolute interest was valid as against the cestui que trust. In this case it is to be observed that the Supreme Court affirmed the opinion of the court below without discussion, and that the learned judge of the court below was unable to cite any authority in favor of the proposition which he laid down. *Frantz v. Race*,⁸ *King's Estate*⁹ and *Spring's Estate*,¹⁰ although tending to support the principle laid down in *Krebs's Estate*, can all be explained on other grounds. *Shower's Estate*,¹¹ however, reaffirms the doctrine of *Krebs's Estate*. In

² 59 Pa. 393 (1868). This case not in point, as it only decides that a clause against involuntary alienation prevents the operation of the statute of uses; see §131, ante. If the learned judge meant to say that a trust of a life estate could be created, he was correct, but his language gives the impression that an absolute gift may be tied up for the life of the first taker, for which proposition the case cited is not an authority. The proposition is sus-

tained by *Krebs's Est.*, 184 Pa. 222 (1898), stated §519, ante; see also *Calhoun's Est.*, 34 Pa. C. C., 555 (1907), accord.

⁴ See §517, ante.

⁵ See §518, n. 8, ante.

⁶ 177 Pa. 190 (1896), stated §518, ante.

⁷ 184 Pa. 222 (1898), stated §519, ante.

⁸ 205 Pa. 150 (1903), stated §520, ante.

⁹ 210 Pa. 435 (1904), stated §521, ante.

¹⁰ 216 Pa. 529 (1907), stated §523, ante.

¹¹ 211 Pa. 297 (1905), stated §522, ante.

none of these cases did the Supreme Court notice the earlier authorities in Pennsylvania and the court has obviously been influenced by an undue weight given to the self-evident proposition that a man may do with his own property anything which is lawful,¹ and also by the fallacy that putting an estate in trust indicates an intention to cut down the fee.² However objectionable on principle, it must be concluded under these cases that it is the law in Pennsylvania that a donor may fetter an absolute gift with a trust, with the question open as to the period of time during which the trust may subsist.³ It is perhaps not too much to hope that the Supreme Court will overrule these unfortunate decisions and return to the sounder doctrine of the common law.

The Real Question Involved

525. It is of no importance that the settlor intended to create a trust of a fee, nor is it material that he vested active duties in the trustees. There is no room for controversy in these cases that such was the intention of the donor; the specific question is whether his intent can prevail as against the principle of law. The question is not whether the donor intended to create a valid trust,⁴ but whether the trust which he has created is valid; not whether the donor can create a trust of an absolute interest, but whether the trust of an absolute interest which he has created can remain as against the objection of the cestui que trust. The preliminary question is one of construction; it is necessary to determine what is the nature of the estate which is given to the cestui que trust, and it is important to remember that he can take only a fee, a life estate or an estate for years, and the court cannot by any course of reasoning give the gift any other effect.

Consequences of Upholding the Trust of an Absolute Interest

526. If the court means to adhere to the doctrine that a trust of an absolute interest is valid as against the cestui que trust, the further question will arise: for how long will

¹ Elkin, J., in *Spring's Est.*, 216 Pa. 529 at 533 (1907). For a discussion of this proposition, see §2, ante.

² For a discussion of this fallacy, see §522, n. 7, ante.

³ Confer §§243, 254, ante.

⁴ See remarks of Hanna, P. J., in *Wright's Est.*, 28 Pa. C. C. 540 at 541 (1903).

the trust be upheld?⁶ Will a period similar to that prescribed by the rule against perpetuities be adopted? If so, from what time will the prescribed period commence to run? These are questions of no small difficulty, and their solution will require litigation, which the court can easily save the people of the commonwealth by adhering to the safe path of the common law, and overruling Krebs's Estate⁷ and Shower's Estate⁸ at the first opportunity.

⁶ See 19 Harv. Law Rev. 598 at 603 (1906).

⁷ 184 Pa. 222 (1896), stated §519, ante.

⁸ 211 Pa. 297 (1905), stated §522, ante.

CHAPTER 23

DISCRETION

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Preliminary Discussion

530. A trustee is subject to the control of the chancellor in the exercise of the power which he possesses, whether inherent or special.¹ A discretion, as we have seen,² leaves the doing of the act to the personal judgment of the trustee, and to that extent liberates him from the control of the court.

¹ See §153, ante, et seq., for a discussion of powers in a trustee.

² See §158, ante.

Discretionary powers as to the legal title have no effect on the interest of the cestui que trust. They fall when the trust terminates and are of no importance in the present discussion.³ Where, however, the discretion is as to the doing of an act affecting the equitable interest, a different question presents itself. If the exercise of the discretion involves the substitution of another equitable interest, it seems unobjectionable except in so far as the rule against perpetuities is concerned.⁴ If no one else can have any benefit under the discretion, its exercise may be a restraint on the equitable estate of the cestui que trust, and void at his instance as violating the rule forbidding restraints on enjoyment. This is the particular point to be examined in this chapter. The matter has, however, been very little discussed by the text writers, and there is a great dearth of authority on the subject.

Legal Discretion

531. The discretion is said to be legal when the trustee is authorized to exercise the discretion if certain specified circumstances exist. The court will judge whether the facts are in existence, and if they are, the trustee will be compelled to exercise the discretion. If the facts do not exist the chancellor ordinarily will not interfere.

Absolute Discretion

532. An absolute discretion is said to exist when the doing of something with respect to the trust property is left to the sole discretion of the trustee, without reference to any extrinsic circumstances. In such case the discretion cannot be interfered with unless its exercise amounts to a restraint on the use and enjoyment by the cestui que trust of his equitable estate.

Distinction Between Discretion as a Condition Precedent and Discretion as to a Vested Interest

533. One further distinction remains to be noticed: the exercise of the discretion may be a condition precedent to the

³ See §§415-436, ante, for a discussion of these powers and the application of the rule against perpetuities.

⁴ For the application of the rule against perpetuities, see §§411-413, ante.

vesting of the interest or it may be a discretion exercisable as to an interest already vested. In the first case the validity of the interest taking effect under the discretion is determined by the application of the rule against perpetuities.⁵ In the second case the donee of the interest may or may not be able to interfere with the exercise of the discretion, according to whether the rule forbidding restraints on enjoyment applies or not.

Legal Discretion as to Principal

534. Legal discretion with reference to principal usually appears in the form of a clause giving the trustee discretion to make advances out of the principal to the life tenant if certain extrinsic circumstances exist. While such a clause is of frequent occurrence,⁶ cases in which any question as to the force and effect of the discretion is involved are rare. Since the principal belongs to the remainderman, the failure of the trustee to exercise the discretion in favor of the life cestui que trust does not violate the rule forbidding restraints on enjoyment. The discretion simply involves a change of equitable beneficiaries. The life tenant must make out a case showing that the necessity exists if he wishes to compel the exercise of the discretion by the trustee.

Erisman v. Directors of the Poor

535. In *Erisman v. Directors of the Poor*⁷ a testator gave a portion of the residue of his estate in trust for the use of Lydia, a married woman, directing the trustee to hold the same in trust during her life and from time to time to "apply the interest arising thereby for the purchasing and payment of such necessities of life as he may think right and proper, but such trustees shall only be allowed to apply any principal if urgent necessity should require, and in no case shall be allowed to pay any debts contracted by said Lydia or her husband," and after her death to divide what remains among the children of Lydia. Lydia was declared a lunatic, and an action was brought by the Directors of the Poor against the trustees

⁵ For a discussion of this point, see §§411-413, ante.

⁶ For instances of the clause, see *Goche-nauer v. Froelich*, 8 Watts, 19 (1839); *Eberly's App.*, 110 Pa. 95, (1885),

Clark's Est., 134 Pa. 140 (1890); *Yetter's Est.*, 160 Pa. 506 (1894); *Stiles v. Bank*, 33 Super. Ct. 57 (1907); *Jones's Est.*, 28 Pa. C. C., 293 (1903), s. c. 12 D. R. 113. ⁷ 47 Pa. 509 (1864).

to recover the money they had paid out for her support in the Pennsylvania Hospital. It was held that they could recover out of principal and income. Thompson, J., in the Supreme Court,⁸ said, "The objection that this dispenses with the discretion of the trustee has no merit. His discretion is but a legal one, and whenever the law determines that a proper case has arisen in which the trustee's discretion should have been exercised in a particular way, he will be constrained to act in accordance therewith."⁹

Baeder's Estate

536. In *Baeder's Estate*¹⁰ the testator divided his estate into as many shares as he had children, and as to the shares of the sons he directed his trustees to pay each of them five thousand dollars on attaining the age of twenty-one years, and, on attaining the age of twenty-five, to advance an amount equal to one-half the son's share, the power to be exercised as the trustee should deem proper, "looking to the habits, conditions and circumstances of my said sons respectively." The residue was to be held by the trustees, the income to be paid to the sons respectively, without liability, etc., and, upon the death of the sons, the share to be paid to their children, and in default of children, to pass under the will as if the sons had died before the testator. One of the sons passed the age of twenty-five without the half of his share having been advanced to him, and died, and a claim was made by his executors to have this one-half paid to them. The Supreme Court, in an opinion by Mitchell, J., held that the executor was entitled to the one-half of the share, because there was an absolute gift of the one-half to the son, with a clause giving the trustee discretion to withhold payment and add to the residue upon certain conditions, and as the trustees had not exercised that discretion affirmatively in the lifetime of the son, they could not do so now, the opportunity to judge of the circumstances having passed, as the son was dead. It is submitted, however, that since there was a gift over of the principal on the death of the son, the discretion was to be exercised against the remaindermen, and, therefore, until it was exercised the son took nothing.

⁸ At p. 514.

⁹ Dictum in *Stewart v. Madden*, 153 Pa.

445 at 448 (1893), stated §663, post;

Geiger's Est., 24 Pa. C. C. 238 (1900),

s. c. 9 D. R. 457, accord.

¹⁰ 190 Pa. 606 (1899).

Preliminary Discussion of Absolute Discretion as to Principal

537. An absolute discretion as to principal generally takes the same form as legal discretion, that is, a clause giving the trustee discretion to make advances out of the principal to the life tenants.¹¹ If the discretion is not exercised in such case, the money which should otherwise have been paid goes over to those entitled in remainder, and it is not necessary, where such disposition appears from the whole course of the settlement, for the settlor to expressly direct the trustee to add the sum which he did not pay to the life cestui que trust to principal, for it is already there.¹ Since the discretion is absolute in this case it will not ordinarily be controlled by the court, and the life cestui que trust has no remedy if the trustee declines to exercise the discretion in his favor.²

Marshall's Estate

538. In *Marshall's Estate*³ the testator gave his estate to his executors in trust for the benefit of his children, making them all equal at twenty-one, and should any of them die without issue their interest should go to the survivors or heirs of his deceased children, with a clause giving the trustees power to give or withhold the corpus as they thought for the best interests of the children. An account of the trustees being filed, the court below said that one of the questions presented was as to the duration of the trust under the will. It is presumed, although the report does not so state, that one of the children applied to have it terminated. On appeal, the Supreme Court held that the trust was active and did not terminate when the youngest child reached twenty-one. The court based the decision on the ground that as the trustees

¹¹ For an example of such a discretion, see *Ogden's Est.*, 211 Pa. 247 (1905).

¹ For a case where a trustee exercised his discretion and made advances out of the principal to the life tenant, see *Beaumont's Est.*, 195 Pa. 1 (1900); the case arose on an attempt by those entitled in remainder to surcharge the trustee with advances he had made; see also *Brubaker v. Huber*, 13 Pa. C. C. 78 (1893), a. c. 2 D. R. 703; 10 *Lanc. L. R.* 99.

² There may be an absolute discretion

to divide the principal among the members of the class, and in such a case no one of the class can compel the exercise in his favor; *McAllister's Est.*, 15 D. R. 430 (1906). And if the absolute discretion is to apportion the principal, no one in remainder can compel the exercise of the discretion; *Barker's Est.*, 159 Pa. 518 (1894), stated §239, ante.

³ 147 Pa. 77 (1892). This is the same will as was before the court in *Marshall's Est.*, 138 Pa. 260 (1890).

had not exercised their discretionary powers to terminate the trust, it must still continue to be active at law. However, as there was a limitation over of the principal, in the event of the death of the child without issue, to the heirs or children, the decision may be sustained on the ground that in the event of the non-exercise of the discretion, the share in the principal would go over to a third person. The court said that the effect of the will was to give the children life estates only, with discretionary powers in the trustee to end the trust sooner. The language of the court is not altogether clear, and lends countenance to the view that a trust of an absolute interest with discretion is valid.⁴

Where the Cestui Que Trust Has the Entire Interest

539. A discretion, whether legal or absolute, as to property in which the cestui que trust has the entire interest, is void on principle as a restraint on the use and enjoyment of the property. No case exactly involving this point appears to have come before the Supreme Court. The usual case of this restraint is that of a trust of an absolute interest, which is discussed in another chapter,⁵ and the question as to discretion comes up in the shape of a clause giving the trustee discretion to terminate the trust.⁶ If a trust of an absolute interest cannot remain against the objection of the cestui que trust,⁷ a fortiori a discretion in the trustee to terminate the trust will be void. In several cases the cestui que trust was permitted to terminate the trust, notwithstanding the discretion.⁸ The point has not come before the court since the decisions in the recent cases apparently supporting the validity of a trust of an absolute interest.¹ In *Millard's Appeal*,² where there was a discretion in the trustee as to the payment of the principal to the cestui que trust, it was held that the trustee was liable to the administrator of the cestui que trust for the balance of the principal not paid to the latter in his lifetime.

⁴ For a further discussion of this point, see §524, ante.

⁵ See Chap. 22.

⁶ See §413, ante, for the application of the rule against perpetuities.

⁷ For a discussion of this, see §524, ante.

⁸ *Penna. Co. v. Price*, 7 Phila. 465(1870);

Willard v. Davis, 3 Penny. 86 (1882), *semble*, for a case where the trustee terminated the trust under the discretion, see *Mackrell v. Walker*, 172 Pa. 154 (1895), *stated* §247, ante.

¹ See §524, ante.

² 87 Pa. 457 (1878).

No case has been found raising the question of how far the cestui que trust can compel the exercise of the discretion in his favor.

Preliminary Discussion of Discretion as to Income

540. The distinction between discretion as to income and discretion as to principal is this: where there is a discretion as to principal, there is no necessity to give the estate to any one else upon the failure of an exercise of the discretion, for the exercise of the discretion takes the property away from the remainderman and gives it to the life tenant or some one else, and the failure to exercise the discretion leaves the property where it was. In the case of income, however, if the discretion is exercised against the life cestui que trust, there is no one else entitled to the income embraced in the discretion, unless there is an express gift thereof, if the discretion is exercised, to some one else. The trustee cannot keep it himself, and he cannot add it to the principal, because that would involve an accumulation.³ The court must therefore either declare a resulting trust of the property which is not paid to the life cestui que trust, or compel the trustee to apply it to the latter. It is apprehended that in this case the exercise of the discretion will be a restraint on use and enjoyment by the cestui que trust, and he, therefore, can have the assistance of a court of equity to compel the trustee, notwithstanding the words of discretion, to pay the income to him.⁴ Whenever, however, there is a gift over to some one else other than the remainderman, in the event of the exercise of the discretion, there is no restraint on the use and enjoyment by the cestui que trust of his equitable estate; the exercise of the discretion destroys his estate in whole or in part. In these cases there is a material distinction between legal and absolute discretion. Where the discretion is legal, the cestui que trust can, on proof of the extrinsic circumstances, have the assistance of the chancellor. Where the discretion is absolute, he has no standing at all. No Pennsylvania case on this point has been found.⁵ There are a number of cases in which there was a trust with an

³ See discussion of accumulation under express discretion, §§671-678, post.

⁴ Confer Gray, *Restraints on Alien.*, 2 ed. (1895), §§116-121.

⁵ For an illustration of a legal discretion to apportion income, see *Smith's Est.*, 27 Super. Ct. 494 (1905).

absolute discretion in the trustee as to income.⁶ But few cases have been found in which the effect of the discretion on the interest of the cestui que trust has been passed on. These cases will now be noticed.⁷

Donohue v. McNichol

542. In *Donohue v. McNichol*⁸ there was a gift in trust to pay a son, John, for life "such sum or sums of money as my said executor may deem proper, always allowing, however, my said son John a sufficient sum to support him respectably; and if my said son John becomes a sober, industrious man, it is my will and desire that he should receive the rents, issues and profits of all my real estate during his natural life," with limitations over at the death of John. John being dead and no question as to the life estate being before them, the court said, by way of dictum, in an opinion by Williams, J.,⁹ that "It is clear that under the clause making provision for his support, the son took no interest or estate whatever in the real and personal property devised and bequeathed to the executor; and the amount he was to receive out of the personal property and net income of the real estate for his support was left to the discretion of the executor, subject to the restriction that it should be 'a sum sufficient to support him respectably.'" This is a case of a legal discretion. The dictum should perhaps be referred to as showing the origin of the notion that the life cestui que trust has no interest when there is an absolute discretion in the trustee. This notion has arisen from a failure to observe the difficulty which is present in all these cases. There is a contradiction in the terms of the trust. There is, first, a gift of the life estate, and then a discretion which may defeat the life estate. Since no one else is interested, the contradictory terms of settlement must be reconciled or one or the other must give way. It is apprehended that it is far better and more consistent with the design of the testator to enforce the life estate and ignore the discretion. The attempt to give effect to both is like an effort to blow hot and cold with the same breath.

⁶ E. g., *Still v. Spear*, 45 Pa. 168 (1863).

a somewhat different footing and is valid.

⁷ Discretion as to income while the cestui que trust is a minor stands on

⁸ 61 Pa. 73 (1869).

⁹ At p. 77.

Keyser v. Mitchell

543. In *Keyser v. Mitchell*¹⁰ the trust was "to pay the * * * income or so much thereof as the trustees may think proper and expedient, under all the circumstances of the case, to and for the maintenance and support of my son Charles during all the term of his natural life, with the intent and purpose that the said trustees may either pay the said income or such portion thereof as he may think proper into the hands of my said son, or disburse the same in such way as, to the said trustees, may seem best, for his comfortable support and maintenance, such payments and disbursements to be at all times at the sole and absolute discretion of the trustees." It seems, although the report is obscure on this point, that Charles had only a life estate, and the principal went over. A judgment creditor of Charles sought to attach the income in the hands of the trustee. The court below held that the income was not liable to attachment, which, on appeal, was affirmed. Thompson, C. J.,¹¹ in delivering the opinion of the court, said: "It was no doubt intended by the testator that a comfortable maintenance should be provided from the trust estate for her son, but that was to be in both amount and mode 'at the sole and absolute discretion of the trustee.' This is an express condition of a trust, and until that discretion has been exercised the cestui que trust has nothing. Hill on Trustees, 494-495. In such case chancery will not interfere to control the trustees' discretion." The passages quoted, however, hardly sustain the learned Chief Justice's remarks. So long as there is no direction to pay to anyone else the discretion seems to be void as against the cestui que trust. The learned judge also said:¹ "We cannot but regard this form of trust to be as effectual in guarding a trust and its income against the prodigality of its beneficiary as would be a positive exclusion of creditors in the will of the donor." This is a strong decision against the right of the cestui que trust to compel the exercise of the discretion in his favor.²

¹⁰ 67 Pa. 473 (1871).

¹¹ At p. 477.

¹ At p. 477.

² The case has been approved by Hawkins, P. J., in *Krebs's Est.*, 184 Pa. 222 at 225 (1898); stated §519, ante; Paxson, J., in *Millard's App.*, 87 Pa. 457

at 459 (1878); referred to by Woodward, J., in *Huber's App.*, 80 Pa., 348 at 358 (1876), where the learned judge said: "The extent and character of a devisee's estate depend on the qualities stamped on it and the powers conferred over it by the testator, and not alone in the parties in whom

Hay v. Price

544. In *Hay v. Price*³ Henry H. Price conveyed all his property in trust, and inserted in the trust deed a provision that the trustee "will apply so much of said property, including the rents, issues and profits and the interest arising from said investments, according to his best judgment, for the proper care, comfortable support, maintenance and reasonable happiness of him, the said Henry Hamilton Price, during the whole period of natural life of him," etc., followed by a clause prohibiting voluntary and involuntary alienation. The discretion applied both to the income and the principal, and there was a gift over of the principal remaining at the death of the grantor to the persons entitled after the death of Henry under the intestate laws. The trustee was garnisheed under a judgment against Henry. It did not appear whether the judgment was recovered on a debt contracted before or after the date of the deed. The court, in an opinion by Willson, P. J., held that the creditor could recover. The learned judge based the decision on *Mackason's Appeal*,⁴ and the provisions of the Statute of 13 Elizabeth. Of course, if the Statute of 13 Elizabeth applied, the whole settlement was void, and no question as to the discretion arose. If the Statute of 13 Elizabeth did not apply, the creditor could recover only on the ground that the discretion was void as against the cestui que trust and could be compelled by him, and, therefore, the creditor could, if the cestui que trust refused to act himself, compel the exercise of the discretion and recover the amount of his judgment.

Statement of the Law as to Absolute Discretion as to Income

545. No statement can be ventured as to how far the ces-

the title is formally vested." While the exact connection of the last phrase with what goes before is not clear, it is conceived that if the learned judge has been rightly understood, he has misapprehended the point. The extent of the qualities of and power to be exercised with reference to an estate are established by law, and the estate which may be created is further limited and specified. The question as to which one of the estates the donee is

to take is answered by the words of the gift. The question as to what he may do with that estate is answered by the law, and that law further says that any attempt by the donor to interfere with those legal incidents is void. See also remarks of Penrose, J., in *Barker's Est.*, 159 Pa. 518 at 525 (1894).

³ 32 Pa. C. C., 197 (1906), s. c. 15 D. R. 144.

⁴ 42 Pa. 330 (1862). See §278, n. 7, ante.

tui que trust can compel the exercise of the absolute discretion in his favor, in those cases where there is an absolute discretion as to the income, with no gift over to anyone else in the event of the exercise of the discretion. No Pennsylvania case has been found raising the question between the trustee and the cestui que trust. Where the rights of creditors are involved the court seems inclined to sustain the discretion. The doctrine that the discretion is valid against the cestui que trust cannot be accepted as thoroughly established until the court has sustained the exercise of the discretion against the cestui que trust and decided what disposition is to be made of the income retained by the trustee.

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PART V

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Preliminary Discussion

554. A trust for a married woman, sometimes called a sole and separate use,¹ is, in the respects which will be noticed, a well-established exception to the rule forbidding the creation of restraints on alienation and the rule forbidding the imposition of restraints on use and enjoyment, but is not an exception to the rule against perpetuities. A trust for a married woman is peculiarly a relation under the protection of the court of chancery, and our discussion will be confined solely to equity. There are a number of special doctrines affecting the sole and separate use which obtain in Pennsylvania, and therefore it has been found necessary to devote a separate chapter to the consideration of the subject.

Common Law and Marriage Settlements—Origin and Definition

555. At common law the husband acquired all his wife's

¹ The phrase sole and separate use is, accurately speaking, applicable only in the case where there are no active duties and there is, therefore, a technical use. As to the application of the statute to such a case, see §129, ante. Since, how-

ever, the sole and separate use is not executed by the statute of uses, there is practically no distinction between that and an active trust, and, therefore, the terms sole and separate use and married woman's trust are used interchangeably.

choses in action, which he reduced to possession during coverture, and became absolutely entitled to all her personal property and chattels real. He also acquired a qualified interest in all her freehold estates, which, if he had heritable issue by her, ripened into a joint estate for the lives of himself and his wife. He was also entitled, on her decease, to administer to all her personal estate. The law vested these rights in him in compensation for his liabilities for all his wife's debts, and for the maintenance of the family.³ The practical result of this was that a woman's property was often swept away after the marriage by the improvidence or creditors of her husband. Marriage settlements were invented in order to preserve the wife's property from these common law incidents. These were agreements by which the woman, in contemplation of marriage, contracted with her intending husband that her property, in whole or in part, should be vested in trustees, to be enjoyed by her during marriage as her sole and separate property. These contracts were valid and enforced by the chancellor, the parties not being married, and the consideration good, the intending husband waiving his rights in the woman's property, and the woman conveying to the trustee.⁴ Postnuptial settlements with a similar object came into use and were of like validity.⁵

³ These common law incidents of the property of a married woman have been almost completely removed in Pennsylvania by the Acts of April 11, 1848, P. L. 536, §6; April 3, 1872, P. L. 35; June 3, 1887, P. L. 332; June 8, 1893, P. L. 344; May 25, 1897, P. L. 83, commonly known as the married woman's property acts.

⁴ Perry on Trusts, 5th ed. (1899), Vol. 2, §625; see language of Gibson, C. J., in *McKenna v. Phillips*, 6 Wharton, 571 at 576 (1828).

⁵ It necessarily followed from these principles that a settlement, legal or equitable, made by a woman on the eve of her marriage, without the consent of her intended husband, could be set aside by him at his pleasure; *Duncan's App.*, 43 Pa. 67 (1862); *Robinson v. Buck*, 71 Pa. 386 (1872). Where, however, the husband makes such a settlement, his wife has no

standing to set it aside during his life, because she has no rights which are infringed *Coleman's Est.*, 193 Pa. 605 (1899); *Potter v. The Trust Co.*, 199 Pa. 366 (1901). Where, however, she claims after his death, she can assert her dower right under the intestate law, as against the deed; *Warner's Est.*, 207 Pa. 580 (1904); dictum, *Willson, J.*, in *Potter v. Trust Co.*, 199 Pa. 366 (1901). Since under the married woman's property acts, §555 n. 3, ante, the husband is deprived of his rights in his wife's property during her life, and as his right to set aside her deed during that time was based upon the fact that it was in fraud of these rights, there seems to be no reason at the present time why he should have any greater rights than she has to his deed. This, however, is probably not the law; see *Belt v. Ferguson*, 3 Grant's Cases, 239 (1859).

Settlements by Third Persons

556. When a third person settled property in trust for a married woman, free from the control of the husband, the case was different. The husband's consent was absent, and it was argued with much force that such settlements were invalid as infringing the marital rights and they were accordingly for a long time held invalid. Without very much discussion, however, their validity was finally sustained⁶ on the ground that it was competent for the donor in such a case to annex to the gift such terms as he saw fit and alter the form of transmission of the property so that the trustee should hold it for the separate use of the wife. This is the form in which a married woman's trust is usually thought of in modern times.

Methods of Creation in Pennsylvania

557. A sole and separate use may be created in Pennsylvania in any one of three ways: a prenuptial settlement,⁷ a postnuptial settlement,⁸ and a settlement by a third per-

⁶ *Harvey v. Harvey*, 1 P. W. 125 (1710); *Perry, Trusts*, 5 ed. (1898) Vol. 2., §646.

⁷ *Prenuptial settlement*; *Towers v. Hagner*, 3 Whart. 48 (1837); *Rogers v. Smith*, 4 Pa. 93 (1846); *Pratt v. McCawley*, 20 Pa. 264 (1853); *Whicohite v. Lyle*, 28 Pa. 73 (1857); *Withington's App.*, 32 Pa. 419 (1859); *Rensiehausen v. Keyser*, 48 Pa. 351 (1864); *Hughes-Hallett v. Hughes-Hallett*, 152 Pa. 590 (1893). Husband may covenant with his intended wife that she shall have certain powers as to her property; *Barnes, Lessee, v. Hart*, 1 Yeates, 221 (1793); see also *Gackenbach v. Brouse*, 4 W. & S. 546 (1842); *Birkbeck's Est.*, 215 Pa. 323 (1906). A will executed by the woman before marriage was held valid as antenuptial settlement in *Lant's App.*, 95 Pa. 279 (1880). To be distinguished from a case of antenuptial settlement, whereby the husband and wife relinquished their respective rights in each other's estates; for case of which see *Warner's Est.*, 207 Pa. 580 (1904). And from a postnuptial agreement, to live apart and relinquish all

claims to each other's estate; for example of which see *McKenna v. Phillips*, 6 Whart. 571 (1828).

⁸ *Postnuptial settlement*: Wife's property, *Zane v. Kennedy*, 73 Pa. 182 (1873); *Harris v. McElroy*, 45 Pa. 216 (1863). For a case where a husband conveyed all his interest in his wife's estate in trust, see *Dorrance v. Scott*, 3 Whart., 309 (1837). Of husband's life estate in wife's land, *Duffy v. Insurance Co.* 8 W. & S. 413 (1844); *Campbell's App.*, 80 Pa. 298 (1876); *Lehr v. Beaver*, 8 W. & S. 102 (1844). Thus, where land is devised to be sold and the share of the devisee to be to her sole and separate use, she may elect to take the land instead of the money, and join in an amicable partition, and the use will attach to the land: *Holliday v. Hively*, 198 Pa. 335 (1901); or she may direct that the money due her from a decedent's estate shall be invested in real estate to her sole and separate use, her husband assenting: *Jourdan v. Dean*, 175 Pa. 599 (1896); syllabus in this case inaccurate as it omits the element of the husband's con-

son.⁹ The first and second are comparatively rare, and the third is the most extensively employed. In Pennsylvania, however, the law in all three cases is the same,¹⁰ in so far as the sole and separate use is concerned.

The Estate Which May be Subject to the Trust

558. It was at first supposed that a separate use could only exist for life.¹ The law is otherwise in Pennsylvania and the estate subject to the trust may be for life,² or an absolute interest in real or personal property.³ It could also be created upon an estate tail, but as such an estate is now abolished⁴ this point is practically obsolete. It can no doubt be created upon a term of years.⁵ The quantum of the estate is only of importance in determining the disposition of the property after the death of the woman, or in ascertaining her rights when the trust terminates before her death.

General Definition of a Married Woman's Trust

559. A married woman's trust, therefore, is a trust in which

sent found as a fact. Thus, where the husband used her money in the purchase of real estate under circumstances which raised a trust in her, he cannot by a subsequent declaration impose on the title a sole and separate use without her consent: *Griffith v. Eisenberg*, 215 Pa. 182 (1906). Settlement by wife and husband of moneys in the hands of guardian, to the separate use of the wife: *McMullin v. Beatty*, 56 Pa. 389 (1867). Conveyance by husband and wife to a third person in trust for the sole and separate use of the wife, to be reconveyed to her in fee simple, does not create a sole and separate use, the conveyance being accomplished: *Warden v. Lyons*, 118 Pa. 396 (1898). A valid sole and separate use cannot be created by the exercise of a power: *Yarnall's App.*, 70 Pa. 335 (1872). Whether the trust would be good if the beneficiaries were capable of receiving a sole and separate use at the date of the instrument creating the power has never been actually decided, although such seems to be the necessary implication from the cases, see

§579, post.

⁹ For examples of settlement by third persons, see *Hays' Est.*, 184 Pa. 386 (1898); *Lewis v. Bryoe*, 187 Pa. 362 (1898); *Scott v. Bryan*, 194 Pa. 362 (1899).

¹⁰ Except as to the question of how far there is a liability for the debts of the woman where she creates the trust herself; as to which see §595, post. As to the distinction on principle between the first two and the third, see §§581, 605, post.

¹ First decided in 1844 in England, that a fee could be made subject to a sole and separate use; *Gray, Restraints on Alien.*, 2 ed. (1895), §125.

² *Robins v. Quinliven*, 79 Pa. 333 (1875); *Lewis v. Bryoe*, 187 Pa. 362 (1898); *Souder's Est.*, 203 Pa. 293 (1902).

³ *Cochran v. O'Hern*, 4 W. & S. 95 (1842); *Shonk v. Brown*, 61 Pa. 320 (1869); *Wilbert's Est.*, 166 Pa. 113 (1895); *Jourdan v. Dean*, 175 Pa. 599 (1896); *Shields v. McAuley*, 205 Pa. 45 (1903).

⁴ See §23, ante.

⁵ No case on this point has been found.

the equitable interest of the cestui que trust is not subject to the debts or control of her husband, and differs from any other trust in which a married woman happens to be the cestui que trust only in that the rights of the husband are expressly excluded.⁶ This is one of the few cases in which the maxim that equity follows the law does not apply. The chancellors relieved this estate in equity, when so provided by the donor, from the debts and control of the husband, although at common law, such result would not follow, even if a provision to that effect had been inserted in the gift.⁷ In Pennsylvania, however, equity has gone further than in England, and has annexed to the estate of the cestui que trust an exemption from voluntary or involuntary alienation.⁸

General Principles as to the Language Necessary to Create the Sole and Separate Use

560. It is important, as a matter of practice, to know what language is sufficient to create the trust, or, as stated another way, what is the form of the clause. The common law on this point was perfectly clear and well settled. The creation of the trust was a matter of intention on the part of the settlor. No particular words were necessary, and anything which indicated an intention to exclude the rights of the husband was sufficient.⁹

⁶ Thus, where there is no such exclusion, the husband was entitled, before the Act of 1848, to recover his wife's income from the trustees; *Torbert v. Twining*, 1 Yeates, 432 (1795); see also *Sharpless's Est.*, 151 Pa. 214 (1892), and *Evans v. Knorr*, 4 Rawle, 67 (1833).

⁷ The statement will often be found in the books that the separate estate of a married woman was invented by the courts of equity. This, it is believed, is inaccurate. The courts did not invent the estate; they first enforced the prenuptial settlements, and then by analogy sustained gifts by a third person. If anybody invented the estate it was the lawyers who originated the marriage settlements.

⁸ See this subject discussed, §587, et seq., post.

⁹ In the following cases, before the passage of the Act of 1848, the words indicated

were held to create a valid sole and separate use: A testator devised a certain part of his real estate to trustees to raise thereout the sum of two thousand dollars, the same to be invested and the interest thereof paid annually to his daughter, Edith Speakman, whose receipts should be their sufficient discharge, for her separate use and benefit, whether sole or married, for and during the term of her natural life, and after the death of Edith, the principal to be divided among her children: *Newlin v. Newlin*, 1 S. & R. 275 (1815). Gift of a fund in trust to pay the interest to A., the wife of B., for life, remainder to her children: *Tyson's App.*, 10 Pa. 220 (1849); overruled by *Eshbach's Est.*, 197 Pa. 153 (1900). "In trust for the sole use and benefit of my granddaughter, Maria Francis": *Hamersley v. Smith*, 4 Whart. 125 (1839), dictum. "For her own and sole use forever": *Cochran v. O'Hern*,

It was also the law that it was not necessary to name a trustee whether the subject matter was real estate or personal property.¹⁰ It was not necessary to vest any particular active duties in the trustee in the case of real estate, as equity

4 W. & S. 95 (1842). "To be for her and her family's use during her life": *Heck v. Clippenger*, 5 Pa. 385 (1847); it was held here that the husband was not in legal contemplation a member of the wife's family and, therefore, the words of the trust excluded him; and the only way to exclude him effectually was to construe the gift as a sole and separate use. To a married woman "for her own use": *Jamison v. Brady*, 6 S. & R. 466 (1821). Bond by husband to trustee to use of his wife: *Fisher v. Filbert*, 6 Pa. 61 (1847). "To her own proper use": *Snyder v. Snyder*, 10 Pa. 423 (1849), dictum. "For the sole and separate use of my daughter Ellen Kuhn, for and during the term of her natural life, and that free and clear of any debts, contracts, liabilities or engagements of her husband, and in every respect as if she were a feme sole, and independent of her present or any future coverture; so that she, the said Ellen Kuhn, may in her own person and right, take, receive, and enjoy, expend and dispose of the rents, issues, and profits of the real estate, and the dividends, interest and income of the personal estate, at her sole will and pleasure as aforesaid, during her natural life": *Kuhn v. Newman*, 26 Pa. 227 (1856). "The estate which I have bequeathed to my said daughters, R. and M., shall not be liable to the debts, nor subject to the control of their respective husbands": *Keating v. McAdoo*, 180 Pa. 5 (1897); will dated 1843.

In these cases arising before the Act of 1848, it was held that no sole and separate use was created: "In trust for the use, benefit, and behoof of my daughter," a married woman: *Torbert v. Twining*, 1 Yeates, 432 (1795). "In trust for her, the said A.": *Evans v. Knorr*, 4 Rawle, 67 (1833).

¹⁰ *Scott v. Bryan*, 194 Pa. 41 (1899);

Holliday v. Hively, 198 Pa. 335 (1901), the cestui que trust was co-executor of the will. *Clark, J.*, in *Shalters v. Ladd*, 141 Pa. 349 at 357 (1891); *Sharswood, J.*, in *Reiff & Umstead's App.*, 60 Pa. 361 at 364 (1869). In *Gormley's Est.*, 154 Pa. 378 (1893), the court awarded the fund, consisting of personalty, directly to the woman herself. The only question raised as to this was whether she should be required to give security, and the court said that as she was a trustee for herself, no security would be required.

In these cases no trustee was appointed, and the trust was sustained: *Shank v. Brown*, 61 Pa. 320 (1869); *Wright v. Brown*, 44 Pa. 224 (1863). If no trustee is named the court will, to prevent the trust from failing, constitute the husband, *Heath v. Knapp*, 4 Pa. 228 (1846), or a third person, *Verner's App.*, 80 Pa. 140 (1875); *Wilbert's Est.*, 166 Pa. 113 (1895), a trustee. It is sometimes said that in construing the terms of the settlement the court will consider the naming or failure to name a trustee as a circumstance bearing on the intention of the testator to create a sole and separate use. It is believed, however, that this is a fallacy. If the above statement of the law is correct, this notion is without any weight, for if the naming of a trustee is of no moment then it is hard to see how the court can say that, from the absence of something which is immaterial, any deduction can be drawn as to whether the sole and separate use is created. The creation of such a use is a question of intention, and that intention is indicated by the use of the words excluding the right of the husband. Nothing further need be inquired into. For an example of the application of this fallacy, see *Chadwick v. Stroud*, 27 Pa. C. C., 393 (1902).

avored married women, and the intention of the settlor to protect the woman from the husband made the trust active and consequently the statute of uses did not apply.¹

Notion That the Act of 1848 Changed the Law as to the Language Necessary to Create the Sole and Separate Use

562. The Supreme Court of Pennsylvania found little difficulty in applying these principles until the passage of the Act of April 11, 1848.² That act, which was intended to remove some of the disabilities under which married women labored at common law, has produced an abundant crop of litigation, and the Supreme Court have not yet, after more than sixty years, settled on any canon of construction. The result is that the law is in a most embarrassing state of confusion. It has been supposed that the Act of 1848 created a separate estate in a married woman, similar to the equitable estate which was known before the act, and that although it was competent for anyone to create a married woman's trust, as before, it was necessary to impose active duties and to name a trustee; that mere words of sole and separate use or words excluding the rights of the husband were not sufficient, for the reason that a conveyance or devise without these words would, under the act, create the same estate as if such words were used, and, therefore, they were mere surplusage. In some of the cases decided under this view, the circumstance that the words of separate use were in a codicil or in a subsequent part of the will, was laid hold of as additional evidence of the intention of the testator not to create a married woman's trust.³

History of the Notion That the Act of 1848 Changed the Law as to the Language Necessary to Create the Sole and Separate Use

563. The notion that the Act of 1848 changed the law was first introduced in the case of *Haines v. Ellis*,⁴ was doubted in subsequent cases, and finally distinctly overruled and dis-

¹ See §129, ante, on the application of the statute of uses to the sole and separate use.

² P. L. 536, §6; see §555, ante, n. 3.

³ It may be observed at this point that the controversy over the language neces-

sary to create rarely arises in the case of a prenuptial or postnuptial settlement. This may be owing to the circumstance that in the case of a settlement inter vivos more care is taken as to the language used.

⁴ 24 Pa. 253 (1855).

credited in the case of *MacConnell v. Lindsay*,⁵ and the only cases since reverting to the position of *Haines v. Ellis* are the cases of *Murray v. Lowrie*⁶ and *Chadwick v. Stroud*.⁷ It will therefore be necessary to examine the notion and ascertain what foundation it has in reason. The objections to the notion will be stated, and then the case of *Murray v. Lowrie* commented on at length.

Objections to the Notion That the Act of 1848 Changed the Law as to the Language Necessary to Create the Sole and Separate Use

564. (1) The Act of 1848 does not create the same estate as that which existed in the court of chancery. The legal estate, under the Act of 1848, is an estate as to which the powers of the woman are almost unlimited. She has no powers over the separate use in equity in Pennsylvania except those granted.⁸ (2) The most important thing accomplished by the creation of the equitable estate was the interposition of a trustee between the woman and her husband to protect her from his influence. The Act of 1848 contains no such protection,⁹ and a law which leaves to a married woman the free and uncontrolled disposition of her separate estate is absolutely no protection so far as her husband is concerned.¹⁰ (3) The argument that because the conveyance without the words sole and separate use would convey an estate free from the husband's control, therefore, the words are surplusage and merely a repetition of the donor's intention, begs the question, which is, what did the donor intend by the words? It may also be said that the donor must

⁵ 131 Pa. 476 (1889).

⁶ 208 Pa. 1 (1904).

⁷ 27 Pa. C. C. 393 (1902).

⁸ See §587, et seq., post. She may mortgage her legal separate estate, *Haffey v. Carey*, 73 Pa. 431 (1873), and she may will her separate estate under the Act of 1848. She cannot mortgage or sell her equitable separate estate unless expressly authorized.

⁹ She may, it is true, under the provisions of the Act of April 25, 1850, P. L. 569, §11, apply for the appointment of a trustee for her husband for her legal separate

estate. As such application is solely in her discretion, the act affords her no protection from her husband.

¹⁰ "All experience proves that the highest protection of the wife against her husband is in her disability in her want of power to yield to his solicitations or give way to her sympathies." *Strong, J.*, in *Wright v. Brown*, 44 Pa. 224 at 239 (1863). The Act of 1848 protected the wife's property from her husband's control, but did not protect the wife herself from that control.

be presumed to make the gift with a knowledge of the existing law, and must, therefore, know that without the words of separate use the woman will take her estate free from the control of her husband. The words added, therefore, must have some significance, and what other significance can they have than that the donor intended that the wife should not be subject to her husband's control with respect to her separate estate, and subject to that control she certainly is unless protected by a court of chancery. (4) The notion that the Act of 1848 changed the law seems to proceed upon the theory that the act created a separate estate, because the words sole and separate use are used in the body of the act. The real effect of the act, it is believed, was to remove from the legal title of a married woman certain restrictions and liabilities which had existed at common law.¹ The notion that the absence of a trustee or the absence of active duties is material overlooks a principle of equity settled by nearly one hundred years of repeated decisions.² The language of Strong, J., in *Wright v. Brown*,³ is very clear: "Certainly, however, unless the Act of 1848 caused a change, a deed to a married woman for her separate use does create a trust, though no trustee be named, and it is restrictive of the wife's power to sell or mortgage. On that subject silence is prohibition, and it is plain that the Act of 1848 has no reference to the form or effect of a deed or will. It touches only the effect of the marriage relation. It does not undertake to say that what was a trust before its passage is a trust no longer, or to make that a legal estate which was before merely equitable."

Murray v. Lowrie

565. In *Murray v. Lowrie*⁴ the testator gave a fee simple estate to his daughter, and by a codicil directed as follows: "It is my will and I hereby direct that any and all interests my said daughters or either of them may take in my estate

¹ It also had a similar effect upon the equitable estate of a married woman, which was created without words of sole and separate use, in which she was merely an ordinary *cestui que trust*. In such case, before the act, her interest was liable for her husband's debts. Under the act it is not. The Acts of 1848, 1887, etc., however, do not affect the power of a

woman over her equitable separate estate where there is no sole and separate use clause: Agnew, C. J., in *Page's Est.*, 75 Pa. 87 at 94 (1874); Mitchell, J., in *Steinmetz's Est.*, 168 Pa. 175 at 178 (1895).

² §§129, 560, ante.

³ 44 Pa. 224 at 240 (1863).

⁴ 208 Pa. 1 (1904).

shall inure to them free from any and all liabilities of the debts of any husband either of them may now have or hereafter take and likewise free from the control of such husband." The court in an opinion by Brown, J., held that the daughter had an estate in fee simple which she could convey free from the trust, as the words in the codicil were not sufficient to create a sole and separate use. The court supported the decision on several grounds which will be taken up separately. (1) That the words of the codicil excluding the right of the husband were mere surplusage and only reiterated the legal effect of the Act of 1848, there being no trust created. The objection to this is that it goes back to the fallacy of *Haines v. Ellis*⁵ and entirely ignores the well-considered decisions in *MacConnell v. Lindsay*⁶ and *Holliday v. Hively*,⁷ which overruled *Haines v. Ellis*. The learned judge distinguished *Keating v. McAdoo*⁸ and *Lewis v. Bryce*⁹ on the ground that the remarks of the court in those cases as to the sole and separate use were dicta. That is correct, but the dicta were in accordance with the decisions in *MacConnell v. Lindsay* and *Holliday v. Hively*, neither of which cases were distinguished by the court. The learned judge also said, "If his (testator's) intention to lessen the absolute estate to a separate use and to deprive his daughter of the power of alienation could be gathered from other portions of his will, we might hold that the words in the codicil are appropriate and sufficient for that purpose. But no such intention appears, and the words, standing alone, have no other effect than to repeat the testator's intention to give his daughter a seventh interest in his estate, to her, 'her heirs and assigns forever.'"¹⁰ It is submit-

⁵ 24 Pa. 253 (1855).

⁶ 131 Pa. 476 (1890).

⁷ 198 Pa. 335 (1901). It is to be observed that the same judge who delivered the opinion in *Murray v. Lowrie* delivered the opinion in *Holliday v. Hively*, and it is probably impossible to reconcile the opinions in the two cases.

⁸ 180 Pa. 5 (1897).

⁹ 187 Pa. 362 (1898).

¹⁰ This language is difficult to understand, as a separate use estate may be created as well of a fee as of a life estate; see §558, ante. It is hard to see how the estate can be lessened by a separate use

trust. The reporter understood the language evidently in a totally improper sense, for in the syllabus he reported the case as deciding that the fee simple estate was not cut down to a separate use trust by the codicil. If a fee simple estate is granted it may be subject to a sole and separate use, but to say that it is cut down is far from accurate. It is believed that the learned judge misunderstood the opinion of the court in *Keating v. McAdoo*, 180 Pa. 5 (1897). There was in that case a question, first, as to what estate the devisee took, whether for life or in fee, and to arrive at the answer

ted, however, that it is just as reasonable to infer that the testator made his will having in mind the law under the Act of 1848, which is that the legal estate of a married woman is free from the debts and control of her husband, and that therefore the particular words were put in with the specific purpose of protecting her from the control of her husband. It is immaterial, also, whether the testator intended to give his daughter the power of alienation or not, for the intention of the testator to deprive her of that power is of no weight, as the incapacity to alienate flows from the separate use without any expression to that effect.¹ It may further be observed that the testator might easily have conferred the power of alienation, and, at the time same, have created a sole and separate use. This case leaves the law in great uncertainty.²

View That the Act of 1848 Did Not Change the Law as to the Language Necessary to Create

566. The other view is that the Act of 1848 did not change the rules of construction that had theretofore obtained; that the same words would raise a separate use after the act as before, the construction of such words being well-settled rules of property, and that the equitable and legal separate estates exist side by side, each independent and exclusive of the other. It is believed that this view is sustained by reason and the weight of authority.³

to that question the court considered the limitations in the will and said that the subsequent words of limitation were not such as to cut down the fee to a life estate, and then, in a subsequent paragraph, went on to say that the words of separate use were, under the terms of the will, to be confined to the personal estate, and were not applicable to the real estate. It is submitted, therefore, that it is a misunderstanding of the case of *Keating v. McAdoo* to suppose that it decided that a fee simple estate could be cut down because of a superimposed trust for the separate use of the beneficiary.

¹ See §587, post.

² See *Chadwick v. Stroud*, 27 Pa. C. C. 393 (1902), accord.

³ See remarks of Mr. Justice Clark in

MacConnell v. Lindsay, 131 Pa. 476 (1889), at 491: "But if it be true as we have already shown that these acts relate only to estates created by and existing under the law, and have no reference whatever to the separate equitable estate of a married woman, we cannot see how the language of these acts can in any way be applied in the construction of instruments which, under the numerous decisions of this court, have been held to create a separate estate recognized only in equity. We cannot say that what was a trust before is a trust no longer, or make that a legal estate which, according to a well-established rule of property, has always heretofore been held to be an equitable separate estate only." At 492: "It is immaterial that no trustee was appointed,

Law as to the Language Necessary to Create the Sole and Separate Use

568. The following proposition may be ventured: any words which indicate an intention to exclude the rights of the husband are sufficient to create a sole and separate use; and the failure to name a trustee or absence of active duties is immaterial. The Acts of 1848, 1887, 1893 and 1897 simply remove certain common law disabilities which attached to the married woman's legal title, and do not affect the question, which proposition is rendered doubtful only by the case of *Murray v. Lowrie*,⁴ which doubt is to the effect that the appointment of a trustee and the naming of active duties are necessary in order to distinguish the trust from the estate existing under the Act of 1848.⁵ We have discussed the form

for equity will supply a trustee, nor is it of any consequence that no active duties were imposed, for the creation and existence of a separate use is, in equity, sufficient to support the trust against the effect of the statute of uses. No particular words have ever been held essential or indispensable for this purpose; it is enough that the expression of the conveyance should be such as to clearly indicate the intention of the donor."

⁴ 208 Pa. 1 (1904), and *Chadwick v. Stroud*, 27 Pa. C. C. 393 (1902).

⁵ *In these cases arising since the Act of 1848, decided without reference to the act, it was held that there was no sole and separate use: Conveyance to a trustee in trust for A. during her natural life and at her decease to her heirs in fee, share and share alike, and in the meantime to allow and permit her to receive for her own use the rents and issues thereof, subject to the taxes and costs of executing said trust; Carson v. Fuhs, 131 Pa. 256 (1889), dictum; Jamison v. Brady, 6 S. & R. 466 (1821), contra. Share of A. to be held in trust, to be invested and the interest paid to A. for life and at her death to her daughter C.; Sharpless' Est., 151 Pa. 214 (1892). Gift of residue to daughter absolutely in fee simple, "and it is my will that the said (daughter) shall take and hold the*

property hereby given to her, free from the control of her present or future husband, and without any liability for any debts, liabilities or engagements of such husband, but wholly for her own use and benefit, and subject to her own control;" MacConnell v. Wright, 150 Pa. 275 (1892); extreme case decided upon extrinsic facts as to the propriety of the admission, of which there is grave doubt; overruling MacConnell v. Lindsay, 131 Pa. 476, (1889); arising on the same will. "For the use of the said Isabella, wife of the said Stewart, to allow her to receive to her own use the rents and issues;" Carson v. Fuhs, 131 Pa. 256 (1889).

In the following cases arising since the Act of 1848 the words indicated were held sufficient to create a valid sole and separate use: "It is also my will that the property hereby bequeathed to my said four nieces for their sole and separate use, shall be free from all liabilities, for the debts and contracts or other engagements of any husband or husbands, each or any of them has, or may at any future time have;" Wright v. Brown, 44 Pa. 224 (1863). "To my daughter Ann, the wife of C., and I will and bequeath one share to the sole and separate use of her and her lawful heirs, so that my daughter Ann cannot sell or convey the same, but to descend to

her lawful heirs, and so that the said real property cannot be taken, sold or rented or leased from her, or her heirs, to pay any judgment or demand that may be against her said husband;" *Shonk v. Brown*, 61 Pa. 320 (1869). "Free, clear and discharged from any estate, claim or control of her present or any future husband;" dictum in *Robins v. Quinliven*, 79 Pa. 333 (1875). "For her sole and separate use, and so that her husband shall not have any control over or use of the same, her heirs and assigns forever;" *Varner's App.*, 80 Pa. 140 (1875). "Interest to be paid to her only or her power of attorney, whether married or single, during her life;" dictum of auditor in *Keene's Est.*, 81 Pa. 133 (1876); see also *Hartley's Est.*, 13 Phila. 392 (1880). "As the separate estate of the said A.;" *Richardson v. Aiken*, 104 Pa. 567 (1883); dictum. "That no one of the husbands or wives of the aforesaid children shall have any interest in or control over the property hereby bequeathed, but that the shares of my said children shall belong to them separately and exclusively, whose receipts therefor shall be taken as a full discharge;" *Bailey v. Allegheny National Bank*, 104 Pa. 425 (1883). "Not to be in any wise liable for any existing debts or contracts * * * entered into either by my said daughter or her present husband or any husband she may have;" *Shanty's Est.*, 7 Pa. C. C. 199 (1888). A devise to the testator's son, in trust for his daughter, to permit her to occupy and enjoy the same for her separate use, and not to be under the control or subject to the debts of her husband during her natural life, and at her death to descend to the issue of her body; question arose during continuance of trust; *People's Bank v. Denig*, 131 Pa. 241 (1889). Devise was to the daughter in fee, she "to take and hold the property hereby given to her free from the control of her present or any future husband, and without any liability for any debts, liabilities or engagements of such husband, but wholly for

her own use and benefit, and subject to her own control;" *MacConnell v. Lindsay*, 131 Pa. 476 (1889); the same will came before the Court in the case of *MacConnell v. Wright*, 150 Pa. 275 (1892), and it was there held, in the light of the extrinsic evidence embodied in the case stated and the other language of the will, that there was no separate use created and that in *MacConnell v. Lindsay* the court only had before it the question as to the effect of the Act of 1848. Since the words of the will were clear the admission of the extrinsic evidence was indefensible. There appears, however, to have been no objection to it, and on this point the case may be considered as overruled; see § 273, n. 7, ante. Another ground of decision was, that since by the other parts of the will the daughter took a fee simple with power to sell, in the words of the court, "the intention of the testatrix to create a separate use may be more than doubted." As a fee simple estate may be made subject to a sole and separate use, see § 558, ante, the reasoning of the court on this point is far from conclusive. Too much can hardly be said in criticism of this case. It is indefensible on any ground, and the court seemed to feel, from the language on p. 282, that the decision would not be acceptable to the profession. See also dictum in *Shalters v. Ladd*, 141 Pa. 349 (1891), same will in *Shalters v. Ladd*, 163 Pa. 509 (1894). "To have and to hold the said premises with the appurtenances to her sole and separate use, free from the interference or control of her husband, and to her heirs and assigns forever;" *Hays v. Leonard*, 155 Pa. 474 (1893), see *Forney's Est.*, 161 Pa. 209 (1894). "The shares to my said daughters to be for their own sole and separate use free from any claim of any present or future husband;" *Wilbert's Est.*, 166 Pa. 113 (1895). "It is, however, my will, (should my children agree to a division of my estate after the death of my wife), that the separate portions of my daugh-

ters shall be separately secured to them and to their use beyond the dictation of the husband of either of them;" *Steinmetz's Est.*, 168 Pa. 171 (1895). "For the sole and separate use of;" *Jourdan v. Dean*, 175 Pa. 599 (1896); see also dictum in *Noble's Est.*, 182 Pa. 188 (1897). "The shares of my said daughters shall be for their sole and separate use, and shall be paid into their own hands respectively, upon their own sole receipt therefor;" *Hays' Est.*, 184 Pa. 386 (1898). "For life, under the condition that they shall hold the same exclusively and free from all control of their husbands or any one of them;" *Lewis v. Bryce*, 187 Pa. 362 (1898), dictum. To A., wife of B., "as her own separate estate;" *Scott v. Bryan*, 194 Pa. 41 (1899). A devise of real estate to executors, with power to sell, and a devise of part of the proceeds to her daughter "for her sole and separate use independently of her present or any future husband"; *Holliday v. Hively*, 198 Pa. 335 (1901). This case also decides that the Act of 1893 does not affect the question. Acts June 3, 1887, P. L. 332, and June 8, 1893, P. L. 344, do not contain "sole and separate use." "Unto my daughter B., into her hands, and for her sole and separate use, and on her separate receipt, or to her order in writing, signed by herself, and in the presence of, and signed by one or more respectable witness or witnesses, so that and to the end and intent that the said interest, nor any part thereof, shall in any wise be subject to or liable for the debts, powers, control or interference of her said husband, or any other husband she may hereafter have or take;" *Souder's Est.*, 203 Pa. 293 (1902). "To be held and used by her free from the control of her husband, and as her separate estate;" *Shields v. McAuley*, 205 Pa. 45 (1903). "It is my will and desire that it (the entire estate) be divided between my children, share and share alike, with the condition that the shares flowing to my daughters shall be protected as their separate estate, free from any claim that

their said husbands may have or make, and the fee simple to their children;" *Samson's Est.*, 22 Super. Ct., 93 (1903), 26 Pa. C. C. 405.

In the following cases the words were held insufficient to create a sole and separate use, the court, under the influence of the Act of 1848, applying all or part of the reasoning outlined in §562, ante. In *Haines v. Ellis*, 24 Pa. 253 (1855), it was decided that a conveyance of real estate for a consideration to a married woman in fee, "to and for the only sole, separate and proper use and behoof of herself," etc., vested in her a fee simple estate; that as the Act of 1848 gave married women a separate legal estate, the conveyance gave her the same title she would have taken had not the words "of separate use" been inserted. They were, therefore, surplusage, and the married woman could freely dispose of her estate, provided only that her husband joined in. "The share of my daughters shall be held by them respectively in trust to take the income and appropriate the same respectively, for their own sole and separate use for their lives;" *Reiff & Umsteads' App.*, 60 Pa. 361 (1869). In *Ringe v. Kellner*, 99 Pa. 460 (1882), the testator provided as follows: "All my real and personal estate, after the decease of my wife and after debts and funeral expenses are paid, shall be equally divided among my four children, or their children, in case they themselves are dead. It is also my will that my daughters shall have and hold their share of the inheritance in their own name and shall not let it be controlled by their respective husbands, and the husband shall not inherit it unless there be no child living. I want the estate to be settled up within one year after the last of us is dead, but will leave to my heirs to determine whether they will sell the real estate within that time or settle it among themselves another way, as, for instance, one may take one property and another one another, and pay over the difference." This case may be distin-

of the clause necessary to create the sole and separate use. It is now in order to consider the circumstances which must exist in order that the clause may take effect.

Circumstances Requisite to the Validity of the Sole and Separate Use Clause

570. The circumstances requisite to the validity of the sole and separate use are as follows: (1) the cestui que trust must be a woman;⁶ (2) she must be married or in contemplation⁷ of marriage at the time of the creation of the trust, whether created by the woman herself or by a third person; (3) when the gift is made by a third person, the marriage must likewise be in the contemplation of the donor at the time⁸ of making the gift; (4) if the marriage relation is terminated, the necessary circumstances have disappeared, the clause has no further effect, and the woman can proceed just as if the clause had never been inserted. The law on this

guished by the fact that the testator there declared that the daughters should hold the property in their own name. The court construed that as meaning that they should be seised of the legal title. It is plain, however, that the testator wrote his will without the advice of counsel, and it is, therefore, hard to see how the court could infer that he meant to have technical meaning attached to his words. This construction, however, may be accepted in order to distinguish the case from the subsequent authorities. In *Murray v. Lowrie*, 208 Pa. 1 (1904), stated §565, ante, the testator devised an estate in fee to his daughters, and then by codicil to his will directed that the interest of his daughters should inure to them "free from any and all liabilities of the debts of any husband either of them may now have or hereafter take, and likewise free from the control of such husband." In *Chadwick v. Stroud*, 27 Pa. C. C. 393 (1902), testator devised certain property to his daughters in fee, they to hold the same to and for their own sole, separate and exclusive use and benefit, without being in any way or manner liable to the debts or engagements, control or inter-

ference of their present or any future husbands. The learned judge, Sulsberger, P. J., however, relied on *Ringe v. Kellner*, 99 Pa. 460 (1882), in which, it is to be noted, he was of counsel against the validity of the sole and separate use, and took no notice of the reasoning in *MacConnell v. Lindsay*, supra.

⁶ It hardly seems necessary, were it not for the fact that the question had been raised, to say that such a trust can be created only for a woman; *Neal's Est.*, 13 D. R. 699 (1903). The clause excluding the husband has no meaning where the cestui que trust is a man. A sole and separate use clause will frequently be found inserted in spendthrift trusts where the cestui que trust is a man, for what reason does not clearly appear; see *Penrose, J.*, in *Bouvier's Est.*, 28 Pa. C. C. 266 at 267 (1903).

⁷ The auditing judge in *Hildeburn's Est.*, 8 Pa. C. C. 369 at 370 (1890), spoke of a legal contemplation of marriage. What the difference is between that and any other contemplation of marriage, the learned judge does not state.

⁸ See §573, et seq., post, for a further discussion of this point.

point is too well settled to be disturbed. It is believed, however, to be unsound.⁹ The particular in which the law fails to meet the wants of the community is in the requirement that the woman must be married or in contemplation of marriage at the time of the creation of the trust. This principle deprives fathers and mothers of the ability to protect their young unmarried daughters from future husbands, and that such protection is eminently desirable is past all question.¹⁰

Pennsylvania Cases on the Circumstances Necessary to the Validity of the Sole and Separate Use

571. Where the subject matter was real estate, the interest being in fee, (a) the cestui que trust was permitted to deal with the property as her own as to third persons;¹ (b) a decree was entered in favor of the cestui que trust in proceedings by her against the trustee for a conveyance of the legal title.² Where the subject matter was personal property, and the woman had an absolute interest, (a) she was

⁹ See §§605-608, post, discussing the principles involved.

¹⁰ The expression common in the books is that the trust falls or comes to an end, and, in cases of real estate, the phrase is not an inaccurate description of the operation of the statute of uses. See §129, ante. The implication from the expression is that the trust ends whether the cestui que trust is willing or not. It is submitted that, in the cases of personal property and active trusts of real estate, this is incorrect. In such cases, when the sole and separate use clause has no longer any reason for its existence, the cestui que trust can, if she is so minded, terminate the trust, but until she does so the legal title remains in the trustee and the trust continues; see *Tucker's App.*, 75 Pa. 354 (1874).

¹ (1) After the death of husband: *Smith v. Starr*, 3 Whart. 62, (1838); *McKee v. McKinley*, 33 Pa. 92 (1859); *Stacey v. Rice*, 27 Pa. 75 (1856). (2) After divorce: no case. In *People's Bank v. Denig*, 131 Pa. 241 (1889), it was held that desertion

by the husband did not terminate the trust. (3) Because not married or in contemplation of marriage at the time of the creation of the trust: *McBride v. Smyth*, 54 Pa. 245 (1867). *Hetrick v. Addams*, 12 W. N. C. 367 (1882). For further discussion of the principle involved in these cases, see §129, ante, on the application of the statute of uses to the sole and separate use.

² (1) After death of husband: *Tucker's App.*, 75 Pa. 354 (1874); *Dodson v. Ball*, 60 Pa. 492 (1869); *Nice's App.*, 50 Pa. 143 (1865). (2) After divorce: no case found. (3) Because not married or in contemplation of marriage at the time of the creation of the trust: *Bevan's Est.*, 15 Phila. 615 (1882); *Kuhn v. Newman*, 26 Pa. 227 (1856), executed by statute; no conveyance decreed, same will in *Whichcote v. Lyle*, 28 Pa. 73 (1857). *Ogden's App.*, 70 Pa. 501 (1872); *The Phila. Trust Co's. App.*, 93 Pa. 209 (1880), estate tail; *Kay v. Scates*, 31 Pa. 316 (1860); *Harris's Est.*, 3 Phila. 326 (1859).

allowed to deal with it as to third persons;³ (b) the trustee was directed to transfer the property to the cestui que trust.⁴ In some cases the nature of the property did not appear from the report, but was generally a residue, and probably consisted of both kinds: (a) the cestui que trust was permitted to deal with the property as to third persons;⁵ (b) a decree was entered in her favor in proceedings to have the legal title transferred.⁶

Circumstances Must Exist at the Time the Gift is Made

572. The circumstances requisite to the taking effect of the sole and separate use clause must exist at the time the gift is made. The application of this principle is so plain when the settlement is made by the woman herself, or when made by a third person by deed, that no question as to these cases has ever arisen. Suppose the gift is made by will by a third per-

³ (1) After death of husband: *Hamerley v. Smith*, 4 Whart. 126 (1839). (2) After divorce: no case found. (3) Because not married or in contemplation of marriage at the time of the creation of the trust: no case found.

⁴ (1) After death of husband: *Harrison v. Brolaakey*, 20 Pa. 299 (1853); *Bush's App.*, 33 Pa. 85 (1859); *Hepburn's App.*, 65 Pa. 468 (1870); *Pickering v. Coates*, 10 Phila. 65 (1873). (2) After divorce: *Koenig's App.*, 57 Pa. 352 (1868), doubtful if sole and separate use was created in this case; *Simonds' Est.*, 201 Pa. 413 (1902); *Lee's Est.*, 207 Pa. 218 (1903). (3) Because not married or in contemplation of marriage at the time of the creation of the trust: *Harris' Est.*, 3 Phila. 326 (1859); *Ogden's App.*, 70 Pa. 501 (1872); *Pickering v. Coates*, 10 Phila. 65 (1873); *Gamble's Est.*, 13 Phila. 198 (1878); *Hughes' Est.*, 7 W. N. C., 539 (1879); *Snyder's App.*, 92 Pa. 504 (1880); *Quin's Est.*, 144 Pa. 444 (1891). (4) Because engagement to marry was broken off: *Cozens' Est.*, 29 Pa. C. C. R. 462 (1904), s. c. 13 D. R. 49. *Penrose, J.*, said, "The trust for separate use became inoperative in consequence of the termination of the engagement to marry, in

contemplation of which it was made." The remarks were dicta, and the learned judge leaves it open to doubt as to whether he thought of the engagement to marry or the marriage as being in contemplation.

⁵ (1) After death of husband: no case found. (2) After divorce: no case found. (3) Because not married or in contemplation of marriage at the time of the creation of the trust: *Howard v. Law*, 15 Phila. 341 (1882).

⁶ (1) After the death of the husband: *Williams' App.*, 2nd will, 83 Pa. 377 (1877). (2) After divorce: *Kelly's Est.*, 16 Phila. 273 (1883), report not clear, cannot be told what the case was. (3) Because not married or in contemplation of marriage at the time of the creation of the trust: *Megargee v. Naglee*, 64 Pa. 216 (1870); *Yarnall's App.*, 70 Pa. 335 (1872); *Biddle's Est.*, 15 Pa. C. C. 401 (1894), report obscure. When her interest is for life only she cannot have a conveyance of the legal title or deal with the property as owner, even if no valid sole and separate use, as she is not entitled to the principal in any event; see §160, ante.

son and the circumstances do not exist at the date of the will but occur afterward, and before the death of the testator. The correct principle, it is submitted, is that the validity of the clause is to be tested by the circumstances existing when the settlement will take effect, that is, at the death of the testator. This appears to have been the law until 1883. The Supreme Court in that year laid down a new rule, and it is now the law that the requisite circumstances must exist at the date of the will.⁷

Preliminary Discussion as to Contemplation by the Donor

573. Where the gift is made by a third party, the marriage must be in contemplation of the donor at the time of the creation of the trust. This doctrine has very little foundation in reason, and seems to have been assumed as the law without any discussion. In the cases occurring prior to 1867, it was said that the cestui que trust must be married or in contemplation of marriage, but no case has been found prior to that date in which it was decided that the contemplation meant contemplation by the donor when the settlement was made by a third person. The history of the doctrine is illustrated by the following cases.

McBride v. Smyth

574. In *McBride v. Smyth*⁸ the testator died in 1847; his will was dated 1846; the cestui que trust was nineteen years old at the time of his death, and the date of her marriage does not appear in the report. It was held, with very little discussion, that there was no sole and separate use created.

⁷ In *Neale's App.*, 104 Pa. 214 (1883), the court said that the Act of June 4, 1879, P. L. 88, providing that the will should speak as of the testator's death, does not give vitality to a previous abortive attempt to tie up an estate in a manner wholly beyond the power of the testator to do. It is submitted, however, that this is a misapprehension of the principle involved. It is not a question of power, but a question of whether the circumstances obstruct the exercise of the power,

and that question is to be determined as of the time when the will goes into effect. This decision seems to have met with disapproval; see remarks of Penrose, J., in *Hildeburn's Est.*, 8 Pa. C. C. 369 (1890). The point was again raised in *Quin's Est.*, 144 Pa. 444 (1891), but the Supreme Court, in an elaborate opinion by Mr. Justice Clark, affirmed *Neale's App.*, and the law on this point may therefore be considered as settled beyond a doubt.

⁸ 54 Pa. 245 (1867).

Strong, J., said,⁹ "it is here too well established to be disturbed by anything else than a legislative enactment, that a separate use for a woman cannot be created unless she is covert or unless in immediate contemplation of her marriage." The learned judge does not say anything about contemplation by the donor and the two cases he cites contain no reference to the doctrine.

Wells v. McCall

575. In *Wells v. McCall*¹⁰ the testator republished his will in 1864 and died in 1868. The beneficiary married one month later. On a bill for partition subsequently filed by her against the trustees and the other cestui que trust under the will, the trustees set up in their answer that the testator knew of the proposed marriage, which was postponed because the cestui que trust did not want to leave him; that she was actually engaged at the date of the will, and that the provisions of the trust were made in contemplation of the marriage. The bill was heard at *nisi prius* on bill and answer by Williams, J., who dismissed the bill, which decree was affirmed by the Supreme Court on appeal. The court said, in an opinion by Agnew, J., which was necessary for the decision of the case, that the contemplated marriage need not appear in the instrument creating the trust. The learned judge, however, delivered himself of the following dictum: "The creation of the trust constitutes the evidence of the fact being in the contemplation of the donor or devisor, and when this is followed within a reasonable time by consummation of the marriage, it concludes the proof."¹¹

Springer v. Arundel

576. In *Springer v. Arundel*¹ the will was dated twenty-three days before the death of the testatrix, and the cestui que trust married on the third day after the testatrix's death. The case arose on an action of ejectment by the trustees under

⁹ At p. 250.

¹⁰ 64 Pa. 207 (1870).

¹¹ At p. 215; it is worthy of comment that the learned judge drew his inferences as to the necessity of the marriage appearing on the face of the instrument creating the trust from cases where the settlement was by the woman herself on the eve of an intended marriage. The learned

judge also said, at p. 214, that a contemplated marriage discloses itself. An actual marriage does, but a contemplated marriage is a matter frequently known only to the contracting parties, and can hardly be said to disclose itself. See remarks of Penrose, J., on this case in *Hildeburn's Est.*, 8 Pa. C. C. 369 at 373 (1890).

¹ 64 Pa. 218 (1870).

the will, against one claiming under a deed executed by the cestui que trust and her husband. Held, that the deed was void, as the cestui que trust had only a life estate, and also because the trust was a sole and separate use. As to this point, Agnew, J., said by way of dictum: "As remarked in *Wells v. McCall* the creation of the trust constitutes the evidence of the fact of the marriage being in the contemplation of the devisor, and this being followed in so short a time by the consummation of the marriage, concludes the proof."²

Pennsylvania Law as to Contemplation by the Donor

577. It thus appears that the doctrine as to contemplation by the donor was not even mentioned in the case of *McBride v. Smyth*,³ that it appeared by way of dictum in *Wells v. McCall*,⁴ in which case the fact of the contemplation by the testator was set up in the answer, and that in the case of *Springer v. Arundel*⁵ the court followed the dictum in *Wells v. McCall* without any question or discussion, and that the doctrine has been assumed as law ever since upon the authority of these cases. If the marriage takes place soon enough after the date of the will, there is a presumption that the donor knew of the contemplated marriage. If the marriage takes place long enough after the date of the will there is no presumption that the donor knew of the contemplated marriage. The Supreme Court has never decided exactly what length of time will constitute the dividing line between the two presumptions.⁶

² In *Eastwick's Est.*, 13 Phila. 350 (1880), Penrose, J., said that a limitation over in the event of death without issue indicated that the marriage of the cestui que trust was in the mind of the testatrix. As such limitations are present in almost every settlement the inference is perhaps not very strong.

³ 54 Pa. 245 (1867); stated §574, ante.

⁴ 64 Pa. 207 (1870); stated §575, ante.

⁵ 64 Pa. 218 (1870); stated §576, ante.

⁶ In the following cases the court held that the time which had elapsed from the date of the will was too long for the presumption to arise, and that there was no trust: *twenty-five years*, *Pickering v. Coates*, 10 Phila. 65 (1873); *five years*, *House v. Spear*, 1 W. N. C. 34 (1874);

seven years, *Ogden's App.*, 70 Pa. 501 (1872); contra, dictum in *Page's Est.*, 75 Pa. 87 (1874); *six years*, *Hetrick v. Addams*, 12 W. N. C. 367 (1882); *twelve years*, *Bevan's Est.*, 15 Phila. 615 (1882); *eight years*, *Neale's App.*, 104 Pa. 214 (1883), c. q. t. *ten years* old at date of will; *twenty years*, *Kuntzleman's Est.*, 136 Pa. 142 (1890), c. q. t. *five years* old at date of will. In the following cases no time was stated, and it was held that there was no trust: *Bristor v. Tasker*, 135, Pa. 110 (1890); dictum, in *Boyd's Est.*, No. 1, 199 Pa. 487 (1901); *Wolfinger v. Fell*, 195 Pa. 12 (1900). The age, therefore, of the beneficiary, or the fact that the marriage took place before or after the death of the testator is immaterial.

Objections to the Doctrine That the Donor Must Contemplate the Marriage

578. A sole and separate use is an exception to the rule forbidding restraints on alienation, and the whole object of the Supreme Court in enforcing the doctrine as to contemplation by the donor is to confine that exception within the smallest limits. What can be said in defence of a doctrine which makes the application or non-application of a principle of public policy depend on what was in the mind of a man who is now deceased, and this is what it comes to in the case of wills. The rules which have been laid down by the Supreme Court are merely artificial presumptions to assist in covering up the practical impossibility of carrying out the doctrine. Suppose a young woman is engaged to be married and is suddenly bereft of the parent to whom she is about to disclose her engagement. That parent leaves a will dated one year before his death, creating a sole and separate use for his daughter. The daughter marries six months after her father's death, and although the donor had no knowledge of the engagement, there is, under this presumption, a valid sole and separate use. Suppose, on the other hand, a young woman has disclosed her intended marriage to her father, and he dies having created a sole and separate use by will. The marriage is delayed, for one cause or another, for six or more years after the father's death. The sole and separate use is void under the presumption, and the young woman is likely to have her property swept away by the improvidence and debts of her husband, yet, in this case, the donor knew of the marriage at the time of the creation of the trust. It may be answered that these presumptions may be overthrown by evidence. The evidence is difficult to produce, and no case has been found in which it has been produced. Furthermore, what is contemplation by the donor? How far must the preliminaries between the young people have progressed before the donor can be said to be in sufficient contemplation? A keen-eyed parent may contemplate a specific marriage long before the young woman herself has awakened to the situation.

Executory Trusts and Contemplation by the Donor

579. Where the settlor provides by his will that the sole and separate use shall take effect at some time in the future, is the validity of the clause to be considered with reference to

the circumstances which may happen to exist at that time or those which exist at the date of the will? This question was raised in Snyder's Appeal.⁸ Judge Penrose, in the court below, took the ground that the trust was executory, and that therefore the trustees of the will would have power to complete the trusts at the time fixed, and create a sole and separate use, the requisite circumstances being present at the time. On appeal, the Supreme Court reversed, Mr. Justice Sterrett saying that the case was ruled by *McBride v. Smyth*.⁹ The learned judge also said: "There is practically no distinction between the cases unless we hold that the testator could confer a power upon his executors as trustees, which, according to all our cases, he himself did not possess. If we were to so hold, it would be difficult to foresee the results to which it would lead." It is submitted that the results can easily be foreseen. Any estate taking effect under such power would be governed by the rule against perpetuities, and the rule forbidding restraints on alienation. The decision, however, is a logical result of the principle that the donor must contemplate the requisite circumstances. If these circumstances may or may not exist at some uncertain time in the future after the decease of the donor, they cannot be contemplated by him.

Clause of Sole and Separate Use Invalid Upon Second Marriage

581. If a sole and separate use clause attached to an equitable interest is invalid against a woman who is unmarried at the time of the creation of the trust, it is a fortiori¹⁰ invalid against a woman upon her second marriage. In considering

⁸ 92 Pa. 504 (1880).

⁹ 54 Pa. 245 (1867); stated §574, ante.

¹⁰ Accordingly, in the following cases it was held that the clause was invalid upon second marriage: *Hamersley v. Smith*, 4 Whart. 126 (1839); *Freyvogel v. Hughes*, 56 Pa. 228 (1867); *Rea v. Cassel*, 13 Phila. 159 (1879); *Snyder v. Snyder*, 10 Pa. 423 (1849), contra. A reason for this was given by Mr. Chief Justice Agnew in *Wells v. McCall*, 64 Pa. 207, quoted by Mr. Justice Clark in *Quin's Est.*, 144 Pa. 444 at 456 (1891), as follows: "But a second marriage is evidently a thing not in immediate contemplation, being cut off from view

by the uncertainties of a first marriage, the death of the husband, and an intention to marry a second time." This phrase is far from clear. The learned judge probably meant by uncertainties the fact that the first marriage might not terminate. The clause is, however, capable of another construction, and he does not make clear in what connection he considers the intention to marry a second time,—whether that is to be entertained during the first marriage or not until afterward. How a second marriage could be shut off from view during the first marriage by an intention to marry a second

this question, however, the court has overlooked the material distinction between a trust created by the woman herself and a trust created by a third person.¹¹

Where the Sole and Separate Use Clause Cannot Take Effect but the Trust is Valid on Other Grounds

582. Since the sole and separate use differs from other trusts in which the cestui que trust is a woman, only because of the clause excluding the husband, it follows that when the circumstances under which the clause is valid are absent, the case is to be considered as if the clause had been omitted from the instrument, and the cestui que trust will not be entitled to the legal title if there are other elements of a valid trust.¹

time the learned judge does not inform us. Criticism on this point may seem hypercritical, but it is useful as showing the illogical manner in which the Supreme Court has considered this question, and the superficiality of the reasons which have been assigned. There are some expressions, however, which support the view that a trust for a married woman would revive upon second marriage. Thus, in *Dunn's App.*, 85 Pa. 94 (1877), there was a deed of trust by a woman and her husband, to the sole and separate use of the woman. The court held, the woman being dead and having been divorced from her husband a month before she died, that the trust was an active one for her life, and that the trustees were to carry it out under the deed of trust. Mr. Chief Justice Agnew said that she clearly indicated her intention to protect herself against her own acts, as well as those of her present or any future husband. The trust for coverture only falls at the death of the first husband, but this she intended to be carried over to any future husband; and in connection with the provision against her own debts, she disclosed a plain intention to make the trust for life and not for coverture only. The trust in this case having been created by the woman herself would undoubtedly be invalid against a second husband; see §605, post. See also remarks of the court in *Forney's Est.*, 161 Pa. 209 at

212 (1894), citing *Dunn's App.*, supra; *Hanna, P. J.*, in *Wright's Est.*, 28 Pa. C. C. 540 at 541 (1903). It is quite common, however to find in Pennsylvania settlements, a clause as to "present or any future husband." Such a phrase seems to be utterly useless.

¹¹ See §605, post.

¹ *Harris v. McElroy*, 45 Pa. 216 (1863); *Yarnall's App.*, 70 Pa. 335 (1872); *Robins v. Quinliven*, 79 Pa. 333 (1875); *Williams's App.*, 1st will; 83 Pa. 377 (1877); *Forney's Est.*, 161 Pa. 209 (1894); *Seitzinger's Est.*, 170 Pa. 500 (1895); *Noble's Est.*, 182 Pa. 188 (1897); *Boyd's Est.*, No. 1, 199 Pa. 487 (1901), dictum; *Denis's Est.*, 201 Pa. 616 (1902); see *Biddle's Est.*, 15 Pa. C. C. 401 (1894). It is important to notice in this connection that a distinction may be drawn between the case where the sole and separate use is of a life estate and where it is of fee simple. In the former case the invalidity of the sole and separate use clause will not enable the cestui que trust to terminate the trust; *Earp's App.*, 75 Pa. 119 (1874); *Ash's App.*, 80 Pa. 497 (1876); whereas, in the case of a fee, the termination of a separate use will always entitle the cestui que trust to call for a conveyance; *Dodson v. Ball*, 60 Pa. 492 (1869); *Megargoe v. Naglee*, 64 Pa. 216 (1870). See, however §524, ante, on a trust of an absolute interest.

Preliminary Discussion as to the Effect of the Clause

587. We have now considered the form of the clause which defines a sole and separate use, and ascertained the circumstances which must exist in order that the clause may take effect. It now remains to consider, all these elements being present, what the effect of the clause is, or, as it is sometimes stated, the incidents of the trust. We shall discuss the subject, first, as to the woman cestui que trust and then as to her husband. As to the woman cestui que trust, we shall consider (1) her power to deal with the equitable title; (2) the liability of the same for her debts;² (3) the clause against anticipation. As to the husband of the woman cestui que trust, we shall consider (1) his power of control over the equitable title; (2) its liability for his debts, and (3) his rights after the death of the cestui que trust.

Preliminary Discussion as to the Effect of the Clause on Voluntary Alienation

588. A restraint on voluntary alienation when attached to a sole and separate use clause is valid whether the interest is absolute³ or for life.⁴ It is an exception to the general rule, and as such is supported on the principle of public policy having in view the protection of married women. It was for a long time uncertain whether the restraint must be expressly inserted in the trust. If the legal title to the wife's property was vested in a trustee, the husband's rights at law were effectually excluded. If the trustee were directed to hold the estate solely for the benefit of the wife, without the interference of her husband, he could, in equity, recognize no one but the wife as the owner, as the chancellor enforced the trust according to the wish of the donor. Therefore, as to her equitable separate estate, the wife was in the same position as a feme sole. The only effect of the marriage was to subject her title to the husband's control, and, therefore, when freed from that control she should, on principle, have all powers which were not expressly denied her in the instrument creating the trust. The obvious danger to the married woman,

² That is, the question that will be viewed from the standpoint of the distinction between voluntary and involuntary alienation.

³ Gray, *Restraints on Alien.*, 2 ed. (1895), §269, et seq.

⁴ Gray, *Restraints on Alien.*, 2 ed. (1895), §§140-142.

in thus leaving her in the unfettered control of her separate estate, and consequently exposed to the rapacity, extortion and influence of her husband, was apparent to the early chancellors, and they sought to obviate the danger by reading into the settlement terms of restraint which the donor had not sufficient foresight to insert therein. This conflict between principle and expediency, was long and greatly unsettled the law, and different views were held by some of the most learned chancellors.⁵ In Pennsylvania it is the law that the woman cestui que trust has only those powers over her sole and separate estate which are granted in the instrument creating the trust. The Pennsylvania cases will now be examined.

Newlin v. Newlin

589. In *Newlin v. Newlin*⁶ the testator created a sole and separate use for his daughter Edith. A suit was brought against the executors of the will upon a bond, and the question at the trial was, whether the husband of Edith was a competent witness. In order to remove his interest, there was offered a release which he and his wife had executed to the trustee of the will. It was held that by the release he became competent and that a feme covert had as to her separate use all the powers of a feme sole, and could make such disposition thereof as she pleased.⁷

Lancaster v. Dolan

590. In *Lancaster v. Dolan*⁸ Tacy Prior, a single woman, executed a deed, in which she covenanted to pay for the use of her mother one-half of the rents of certain premises, of

⁵ For a full and able discussion of the whole subject and review of the cases, the reader is referred to the cases of *Methodist Church v. Jaques*, 3 John. Ch. N. Y., (1817), and *Ewing v. Smith*, 3 Desaussure's Reports 417, (1811), S. C.

⁶ 1 S. & R. 275 (1815).

⁷ It is to be observed that the cestui que trust released her interest, and there is a material distinction, as pointed out by Mr. Justice Lowrie, in the case of *Haus v. Palmer*, 21 Pa. 296 at 299 (1853), between a release and an assignment; that is, no one is bound to accept a benefit thrown

on him by will, and, if he rejects it, he is without interest. There is no reason why this rule should not extend to the case of a married woman. *Gibson, C. J.*, in *Lancaster v. Dolan*, 1 Rawle, 231 at 247 (1829), says that this case was hastily determined upon an exception to the evidence. Mr. Binney says, *The Leaders of the Old Bar of Philadelphia, Law Association Centennial*, p. 113, that "he (Gibson) never made a greater mistake unless when he overruled the authority."

⁸ 1 Rawle, 231 (1829).

which she, Tacy, was the owner. Subsequently the mother and daughter united in a deed of the same real estate to trustees, in trust, one-half for the use of the mother for life,⁹ remainder to Tacy under the uses thereafter declared, and as to the other one-half, and the remainder after the death of the mother, for the use of Tacy for life; and in case she should marry, free from the claim of her husband with a general power of appointment and with remainders over in the events which did not happen. Tacy subsequently married Edward Rogers,¹⁰ and she and Edward executed a mortgage upon a portion of the premises comprised in the said deed of trust. A judgment was obtained on the mortgage, and the property sold at sheriff's sale to Israel Lancaster, who brought ejectment against the tenants of Edward and Tacy. The court held there could be no recovery, on the ground (1) that the cestui que trust had no power to convey her equitable separate estate;² (2) that there was a sufficient prohibition of alienation³ in the deed. The remarks of the learned judge as to the power

⁹ No question arose as to the trusts for the mother. They are therefore omitted. It seems as if the mother were still living at the time of bringing the ejectment. If that is so, it is clear that in no event could there be a recovery of more than one-half; see *Ingersoll*, *arguendo*, on p. 237. The Supreme Court held that the conveyance in trust was not void, under the Statute of 27 Elizabeth, Chap. 4, as regards the interest limited to the mother, and that her estate was therefore unaffected by the mortgage.

¹⁰ It does not appear that Edward Rogers ever joined in the deed or gave his assent to it or that Tacy was in contemplation of marriage when she executed the settlement. There is a presumption, from the language of the deed, that she was not in contemplation of marriage. The mortgage joined in by the husband might possibly have been treated as a ratification. This still leaves open the question as to contemplation of marriage.

² Gibson, C. J., said at p. 247: "Nothing in the law is more to be deprecated than those decisions in which the right of the cestui que trust to dispose of his estate

has been recognised." Further at p. 248: "notwithstanding the case of *Newlin v. Newlin*, 1. S. & R. 275 (1815), * * * that the English decisions are so floating and contradictory as to leave us at liberty to adopt the true principle of these settlements; that instead of holding the wife to be a feme sole to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance; and that instead of maintaining that she has an absolute right of disposition unless she is expressly restrained, the converse of the proposition ought to be established—that she has no power but what is expressly given."

³ Gibson, C. J., said at p. 248: "Here the trust is expressed to be for the 'personal support and comfort of the said Tacy,' a clause far more clearly indicating an intent to prevent alienation by anticipation than any to be found in the cases in which the exception prevailed, and the estate of Mrs. Rogers would therefore be unaffected by a rigid application even of the English cases."

of the married woman to convey were dicta, since he found a sufficient prohibition of alienation in the deed. This is the leading case⁴ in Pennsylvania, and the dictum of Chief Justice Gibson has been followed ever since. The cases are collected in the note.⁵

⁴This case is criticized by Mr. Binney in *The Leaders of the Old Bar of Philadelphia, Law Association Centennial*, p. 114, commented on by Penrose, J., in *Gamble's Est.*, 13 Phila. 198 (1878). Mr. Binney said, "It has taken more than one Act of Assembly to patch the hole in the law that was made by *Lancaster v. Dolan*, and it is not well patched yet." As that case is still the law in Pennsylvania on nearly all the points involved, one is at a loss to know what the Acts of Assembly are. Mr. Binney also said, *supra* p. 113, that the decision "swept away every vestige of authority from a married woman during coverture to alienate or pledge her separate trust estate," which, it is apprehended, is a rather broad understanding of the decision.

⁵In the following cases the Supreme Court has passed on the question of the powers of a feme covert cestui que trust as to her equitable separate estate, and reached the result indicated. The learned reader will observe that in many of these cases, where the question of the power of the cestui que trust was raised, the remarks of the court were dicta, as the attempted disposition was of the legal title, to which the married woman as cestui que trust, even without the sole and separate use clause, would be incapacitated. The question of the power of the feme covert cestui que trust to dispose of her equitable interest cannot arise until she has made an attempted disposition thereof. *The feme covert cestui que trust cannot convey: Rogers v. Smith*, 4 Pa. 93 (1846); *Haines v. Ellis*, 24 Pa. 253 (1855), *semble*; *McMullin v. Beatty*, 56 Pa. 389 (1867), dicta; *Jones's, App.*, 57 Pa. 369 (1868), dicta; *Shonk v. Brown*, 61 Pa. 320 (1869), dicta; *Springer v. Arundel*, 64 Pa. 218 (1870), dicta; *Ringe v. Kellner*, 99 Pa. 460 (1882); *MacConnell v. Lindsay*, 131 Pa. 476 (1889),

dicta; *Scott v. Bryan*, 194 Pa. 41 (1899), *semble*; *Shields v. McAuley*, 205 Pa. 45 (1903). In *Lewis v. Bryce*, 187 Pa. 362 (1898), the proposed conveyance was of an interest in fee, but the cestui que trust had only a life estate. This appears to be the main ground of the decision. Where she does convey during the existence of the trust, which conveyance is void, and after the death of her husband, the trust having terminated, accepts payment of part of the purchase money, such acceptance works on ratification and redelivery of the deed, and she is estopped from asserting title against the grantee: *Jourdan v. Dean*, 175 Pa. 599 (1896); *s. c. Miller v. Dean*, 199 Pa. 637 (1901).

As to power to will: A married woman had no power to make a will at common law. This right was first conferred in Pennsylvania by Act of April 11, 1848, §7, P. L. 536, superseded by Act of June 8, 1893, §5, P. L. 344. The power was formerly secured to a married woman by inserting in the settlement a power of appointment under which she could practically make a will of her separate estate. Prior to that act she had no power to make a will, not because of the nature of the equitable estate, but because of her own incapacity. In these cases, prior to the Act of 1848, the question turned on whether the terms of the instrument creating the trust were sufficient to give her a power of appointment; "subject to her order alone," does not give power to will: *Stahl v. Crouse*, 1 Pa. 111 (1845); *Thomas v. Folwell*, 2 Whart. 11 (1836). In *Assy v. Hoover*, 5 Pa. 21 (1846), same settlement as was before the Court in *Hoover v. Samaritan Society*, 4 Whart. 445 (1839), there was a deed of trust to the separate use of A. for life, with power of appointment by will, and limitations over in default of appointment, with power in A.

to revoke the uses, and then to convey and mortgage. A. revoked, made a mortgage, made a will, and then died. Held, that the will was good and so was the mortgage as the latter did not exhaust the power. The mortgage was an appointment of the fee at law and a full exercise of the power, but as equity considers the mortgage merely as security for the debt, the equity of redemption remained after the execution of the mortgage and consequently a further power of appointment, which she could duly exercise by will, subject to the payment of the mortgage debt.

Since the Act of 1848: No case has been found since the Act of 1848 raising the question of the power of the married woman cestui que trust to will her separate estate, except *Steinmetz's Est.*, 168 Pa. 175 (1895). In that case it was argued that she had power to will where the estate was a fee, because the marriage relation ceased with her death, and the will took effect then, and there was no occasion to prolong the restraint on alienation beyond that time. It was held, however, that the will was void as there was no power to make it expressly conferred. The student will observe that *Lancaster v. Dolan* did not raise the question of the power of the cestui que trust to will. At that time a married woman could not make a will because of her common law incapacity; such power as she had existed only in equity under the terms of the instrument creating the trust. No case could arise calling for the application of the principle in the case of *Lancaster v. Dolan*, to the case of a will until after the Act of 1848, when the married woman was given power to make a will. The increase of her common law power should not, on principle, make any difference as to the rule which had theretofore obtained in equity, as to the nature of the estate created by a settlement to her sole and separate use. The practical result is the same, but it is worth while, in the interests of clear thinking, to observe the distinction in the development of the rule

as to the power to will and the rule as to the other powers which she might exercise as to her separate estate. *She cannot mortgage:* *Cochran v. O'Hern*, 4 W. & S. 95 (1842); *Wilson v. McCullough*, 19 Pa. 77 (1852), words of settlement not given, doubtful if there was a sole and separate use; s. c. *McCullough v. Wilson*, 21 Pa. 436 (1853); *Wright v. Brown*, 44 Pa. 224 (1863), probably a mortgage of her own interest; see page 227. In *Maurer's App.*, 86 Pa. 380 (1878), there was a power in the trustee to mortgage and exercise thereof. The cestui que trust, upon a mistaken idea that the trust was revocable, executed a deed of revocation, and then made a mortgage, part of the proceeds of which were used to pay the balance due on the mortgage by the trustee. Held, that to that extent the second mortgage was valid. *People's Bank v. Denig*, 131 Pa. 241 (1889); *Hays v. Leonard*, 155 Pa. 474 (1893); *Holliday v. Hively*, 198 Pa. 335 (1901). She has no power to assent to the revocation of the trust: *Twining's App.* 97 Pa. 36 (1881). *She may not make a marriage settlement thereof:* *Hughes-Hallett v. Hughes-Hallett*, 152 Pa. 590 (1893). *She may not assign the income in the hands of the trustee:* *Shanty's Est.*, 7 Pa. C.C. 199 (1888); dictum in *Dunton's Est.*, 18 Phila. 145 (1887). Decision contra in *Hayes' Est.*, 32 Pitts. L. J., 375, (1885), may be disregarded as totally opposed to reason and authority, and as a decision of a court of inferior jurisdiction. In *Smith v. Broadhead's Executors*, 4 Dall. 115 (1792), the court did not decide whether a feme covert under a deed of settlement of a separate use, with power to make a will could, by directing her executors to pay her debts, make her estate liable for a bond executed by her in her lifetime to pay a debt of her husband. She may, however, give or lend the income to her husband as well as to any other person unless restrained by the terms of the trust: *Towers v. Hagner*, 3 Whart. 43 (1837). And when she has power to mortgage, she may dispose of the proceeds to her

Mr. Gray's Remarks on Power of Alienation

591. Mr. Gray⁶ says that where the estate is in fee the incapacity to alienate lasts only during the life of the cestui que trust; that it is an incapacity only to assign the income, and that consequently she should be able during coverture to transfer the principal subject to her right to receive the income. This point has never been raised in Pennsylvania.

Where Power of Alienation is Specially Conferred—Express Powers

592. The feme covert cestui que trust has the power granted in the instrument creating the trust. The question whether she has a given power or not is a question of construction. The cases are collected in a note under the different powers which usually arise.⁷

husband if she chooses; *Hoover v. Samaritan Society*, 4 Whart. 445 (1839). She may join in an act changing the trustees; *Heath v. Knapp*, 4 Pa. 228 (1846).

⁶ *Restraints on Alien.*, 2 ed. (1895), §126.

⁷ *Power to will*: The cases prior to the Act of 1848 turning on the extent of the power conferred by the deed have already been noticed. The question now is, does the settlement give her power to do that in equity which she can do at law, whereas, the question formerly was whether the settlement gave her power to do that in equity which she could not do at law. In *Drusadow v. Wilde*, 63 Pa. 170 (1869), certain premises were conveyed in trust for the sole and separate use of A., her heirs and assigns forever * * * and upon the further trust that the said A., or such person as she should appoint, should take and receive the rents, issues and profits thereof forever. A. during the coverture devised the premises by will and died. Held, that she had power to make a will under the above clause. Mr. Justice Sharswood said, at p. 172, "We think that the deed of trust vests in her general power of appointment within the rule laid down in *Lanc-*

aster v. Dolan, 1 Rawle, 231, and that the will in question was an effectual exercise of that power," the learned judge proceeding upon the theory that as the power was to dispose of the income forever, it necessarily carried the power to dispose of the principal. In *Dunn's App.*, 85 Pa. 94 (1877), where the woman and her husband united in a conveyance upon a separate use trust for the wife for life, with power of appointment, it was held that a will made by her six years before she made the deed of trust was not an exercise of the power of appointment. For a case of an express power to will and exercise thereof see *Rush v. Lewis*, 21 Pa. 72 (1853).

Power to convey: Power to will does not give power to convey; dictum in *Rogers v. Smith*, 4 Pa. 93 (1846) at 98. Where under the settlement the trustee has power to sell as directed by the cestui que trust a sale by the latter with the joinder of her husband in the manner directed is a good appointment and the trustee will be directed to convey accordingly; *McFadden v. Drake*, 79 Pa. 473 (1875). In *Coryell v. Dunton*, 7 Pa. 530 (1848), there was a power in the cestui que trust to revoke and appoint new uses by deed, and it was

General Principles as to Liability for Involuntary Alienation

593. The separate equitable estate of a married woman is not liable to involuntary alienation.⁸ The reason given by Ashman, J., in *Hartley's Estate*,⁹ it is submitted, does not touch the real point in the case. The exemption from invol-

held that a conveyance by her and her husband, though not referring to the power, passed the estate. For a case of power to appoint by deed and exercise thereof, see *Scott v. Bryan*, 194 Pa. 41 (1899).

Power to mortgage: Power to execute a deed does not give the power to execute a bond and mortgage; *Dorrance v. Scott*, 3 Wh. 309 (1838). Direction to the trustee to pay the income to the use, etc., and disposal of the cestui que trust, does not give her power to mortgage the corpus; *Cochran v. O'Hern*, 4 W. & S. 95 (1842). In *Bailey v. Allegheny Nat'l Bank*, 104 Pa. 425 (1883), there was a gift in trust "that no one of the husbands, etc. of my children shall have any interest in * * * the property bequeathed, but that the shares of my said children shall belong to them separately and exclusively, whose receipts therefor shall be taken as a full discharge." It was held, without any discussion, that a sole and separate use was created, and that the words quoted gave a married cestui que trust power to mortgage, on the ground, in the court below, that a general power of disposition was given by implication by the use of the words "separately and exclusively," citing *Chrisman v. Wagoner*, 9 Pa. 473 (1848). The mortgage here was of all her right, title and interest and probably referred to her equitable interest, and therefore squarely raises the point. See remarks of Brown, J., on this case in *Holliday v. Hively*, 198 Pa. 335 (1901), at 342.

Power to revoke: In the case of *Chrisman v. Wagoner*, 9 Pa. 473 (1848), there was a power to appoint by will, with a limitation over if the cestui que trust died without having withdrawn and without making an appointment or disposition

thereof, and held that the cestui que trust had power to withdraw the principal of the fund during coverture. In *Withington's App.*, 32 Pa. 419 (1859), real estate was conveyed to the separate use of the wife on the eve of marriage, with power in her to appoint by will if she died before her husband. There was a covenant in the deed, which was signed by her husband, that the husband would not oppose any revocation of the trust by the wife, either by deed or will. Held, that the language of this covenant did not increase the powers previously given to the wife and, therefore, a revocation executed by her by deed in her lifetime was void.

⁸ In *Wallace v. Coston*, 9 Watts, 137 (1839), an action was brought against the feme covert to recover for necessities furnished, as the plaintiff alleged, on the faith of the pledge of her separate equitable estate. While there was a doubt whether she had pledged her separate estate, the court said that she had no power to assign her separate estate since she had no express power under the deed of trust and judgment was given against the plaintiff. It seems, however, that the plaintiff could have recovered anyhow, and the only question was whether he could satisfy his judgment out of the separate estate. See also *Crowe v. Lippincott*, 38 Pitts. L. J. O. S. 433 (1891).

⁹ 13 Phila. 392 (1880). "Creditors do not lend to a married woman credit upon the assumption that she is the owner of property in her own right, but content themselves to trusting to the solvency of her husband. They cannot, therefore, be injured by the upholding of a trust for her benefit which ties up no property upon which they can fasten a liability."

untary alienation flows from the nature of the estate itself, and is allowed on grounds of public policy. The state of mind of the creditor of a married woman has nothing to do with the case.

Hays's Estate

594. In *Hays's Estate*¹⁰ the reasoning of the court is very unsatisfactory. The words of the trust were, "for their sole and separate use, and shall be paid into their own hands respectively upon their own sole and separate receipt therefor." The accrued income in the hands of the trustees was attached under a judgment against one of the cestuis que trustent. The court below dismissed the claim of the creditor and its decision was affirmed by the Supreme Court on appeal, in an opinion by Mestrezat, J. As far as can be gathered the court denied the validity of the attachment on the ground that as, under the terms of the trust, it was the duty of the trustee to pay the income into the hands of the cestui que trust, he had not fulfilled his obligations until that was done, and, therefore, no third party could interfere with him in the performance of his duty. The learned judge said,¹¹ "To hold that the duty of the trustee ceases when he has possession of the income, ignores one of the duties clearly and distinctly imposed on him by the terms of the trust." The court, it is submitted, went too far. The trust being a sole and separate use was, without the words "into their own hands respectively upon their separate receipt," exempt from the debts of the cestui que trust.¹ And to base the decision on that ground leaves it open to acute counsel to suggest that the exemption of the income in a married woman's trust from the debts of the cestui que trust depends upon such a clause. Until the Supreme Court has had an opportunity to consider this question again, it would, perhaps, be safer to insert this clause in married women's settlements.²

¹⁰ 201 Pa. 391 (1902).

¹¹ At p. 396.

¹ The unfortunate nature of this language has been illustrated by the necessity the Superior Court felt in *Kunkel v. Kemper*, 32 Super. Ct. 360 at 364 (1907), of pointing out that the language was to be limited to the facts of the case.

² It is believed that the court in this

case was misled by the argument of the counsel for the appellant. There was no clause against anticipation in the will, and it was totally unnecessary to base the decision on any question of construction as to whether the language of the testator imposed such a restriction on the cestui que trust. The creation of a sole and separate use was sufficient.

Effect of the Clause as to Involuntary Alienation When the Trust is Created by the Woman Herself

595. Does the clause protect the equitable estate from liability for the debts of the woman when she creates the trust herself?³ In *Stewart v. Madden*⁴ the court expressly refused to pass on the question as unnecessary to the decision of the case, and the point is therefore open in Pennsylvania.⁵ In *Ghormley v. Smith*⁶ an unmarried woman not in contemplation of marriage made a settlement to her sole and separate use, and it was held that the trust was no protection from her creditors during a subsequent marriage, as the sole and separate use clause was void in the beginning.⁷ The case presented was that of an ordinary trust and consequently liable for the debts of the settlor.⁸

Clause Against Anticipation

596. The clause against anticipation was first invented by Lord Thurlow⁹ and grew into favor as a means of restraining the uncontrolled power of a feme covert over her separate estate, which power¹⁰ seemed to be the necessary consequence of freeing her property from her husband's control. The clause, as originally worded, was "and not by anticipation," the effect of which was to prevent the feme cestui que trust from disposing of her equitable estate.¹ The clause, although frequently inserted, is entirely unnecessary in Pennsylvania,² as the feme cestui que trust has no powers except those granted in the instrument creating the trust.⁴ It is a vain thing to forbid

³ See §557, ante, as to the methods of creating a sole and separate use and §593, ante, that there is no liability for debts when created by a third person.

⁴ 153 Pa. 445 (1893).

⁵ See Gray, *Restraints on Alien.*, 2 ed. (1895), §§226, 268a.

⁶ 139 Pa. 584 (1891).

⁷ See §570, ante, as to circumstances requisite for the trust to take effect.

⁸ See §278, ante, as to a settlor creating such a trust for himself.

⁹ Lewin on Trusts, 8th ed. (1888), Vol. 2, p. 781.

¹⁰ See §588, ante.

¹ Lewin on Trusts, 8 ed. (1888), Vol. 2, p. 781. Just why it had that effect the

text writers do not state. She could not, under the clause, ask for income before it was due her. An assignment by her gave the assignee power to collect the future income, and the assignment was probably, for this reason, considered as an indirect anticipation. For a discussion of the clause from the English point of view, see the opinion of the court below in the case of *Dubs v. Dubs*, 31 Pa. 149 at 152 (1858). See Gray, *Restraints on Alien.*, 2 ed. (1895), §270, and cases cited.

² See the opinion in *Crowe v. Lippincott*, 38 Pitts. Law Journal, 433 O. S. (1891), *Ferguson, J.*, in *Shanty's Est.*, 7 Pa. C. C. 199 at 200 (1888).

⁴ See §588, ante.

her to do that which she has no power to do. The doctrine discussed by Mr. Gray,⁵ that the clause against anticipation is to be disregarded when it violates the rule against perpetuities, is inapplicable in Pennsylvania, as a married woman's trust cannot be created except for a living person, and the clause against anticipation, therefore, can never violate the rule.⁶

King's Estate

597. In *King's Estate*⁷ there was an attempt to create a sole and separate use which failed. There was also inserted in the settlement a clause against anticipation. The trustee advanced income to the cestui que trust before it had been paid to him, and, in consequence, as there was an overpayment, was compelled at the audit to claim a credit for that amount, to which state of affairs the clause against anticipation could have no application. The credit was allowed. Strangely enough, however, the attention of the court seems to have been chiefly directed to the clause against anticipation, no question as to which was properly before them. On appeal, the decree was affirmed by the Supreme Court, Green, J., saying:⁸ "The cestui que trust has actually received the payments made in perfect good faith by the trustee, and she was as much in fault in violating the clause against anticipation as the trustee was in making payments. She has therefore no equity to be heard against her own wrongdoing."⁹

Effect of the Clause of Sole and Separate Use on the Power and Control of the Husband

599. The effect of the sole and separate use clause in freeing the estate of the married woman cestui que trust from the control and debts of her husband is so clear that it has apparently never been questioned.¹⁰

⁵ *Restraints on Alien.*, 2 ed. (1895), §§272-272g.

⁶ As to the clause against anticipation in spendthrift trusts, see §280, ante, Gray, *Restraints on Alien.*, 2 ed. (1895), §272g.

⁷ 147 Pa. 410 (1892).

⁸ At p. 414.

⁹ These remarks, which were plainly dicta, are totally opposed to the law in England, where the cases are clear that the trust

tee cannot take refuge in the connivance of the cestui que trust in evading the clause; Gray, *Restraints on Alien.*, 2 ed. (1895), §271, and cases cited. See language of Woodward, J., in *Lowrie's App.*, 1 Grant's Cases, 373 at 376 (1856).

¹⁰ Not liable for judgment for joint tort of husband and wife: *Pullen v. Rianhard*, 1 Whart. 514 (1836). Not liable for husband's debts even when in actual posses-

English Chancery Doctrine as to Right of the Husband in the Sole and Separate Use When the Subject Matter is Real Estate

600. It was at first decided in England that the husband had no estate as tenant by the curtesy in lands which were held to the sole and separate use of his wife in fee.¹ When the question was first raised in Pennsylvania the early English principle was followed, and the husband denied his estate as tenant by the curtesy.²

Pennsylvania Law as to Right of the Husband in the Sole and Separate Use Where the Subject Matter is Real Estate

601. The law in Pennsylvania is now well settled the other way, and the husband is entitled to his estate as tenant by the curtesy in lands which are held to the sole and separate use of his wife in fee.³ There are two reasons for the

sion of the husband and wife: *Yardley v. Raub*, 5 Whart. 117 (1840). The principle would be different when he carries on the trade with the separate property or his possession is inconsistent with the deed of trust: *Sergeant, J.*, in *Yardley v. Raub*, 5 Whart. 117 at 124 (1840). Real estate, the legal title to which was vested in the husband and wife, to the sole and separate use of the wife, not liable for debts of the husband: *Lichty v. Hager*, 13 Pa. 565 (1850). Trustees under such a settlement justified in refusing to pay any part of the trust funds to the husband on the wife's order: *Lowrie's App.*, 1 Grant's Cases, 373 (1856). If she has power to mortgage she may make a mortgage for the benefit of her husband: *Hoover v. Samaritan Society*, 4 Whart. 445 (1839).

¹ Lewin, *Trusts*, 8 ed. (1888) Vol. 2, p. 735, and cases cited. Opinion of Rogers, J., in *Cochran v. O'Hern*, 4 W. & S. 95 (1842). The doctrine was based upon two grounds: (1) on want of seisin in the wife during coverture, the legal estate being in the trustees; (2) on the intention of the donor that the rights of the husband should be excluded. After much fluctuation the rule was settled the other way, and the husband became entitled. Lewin, *ubi supra*, p. 735.

² *Cochran v. O'Hern*, 4 W. & S. 95 (1842); *Stokes v. McKibbin*, 13 Pa. 267 (1850), *Gibson, C. J.*, at p. 268 making the question turn entirely on the intention of the donor; *Rigler v. Cloud*, 14 Pa. 361 (1850), going on the ground of intention as disclosed in the settlement. The clause was as follows: "not to be in any way liable to the future control, debts or liabilities of her present or any future husband." *Ash v. Ash*, 1 Phila. 176 (1851); *Freyvogel v. Hughes*, 56 Pa. 228 (1867), *semble*. It will be observed that this is another case where equity does not follow the law.

³ In *Dubs v. Dubs*, 31 Pa. 149 (1858), the woman was not in contemplation of marriage when the trust was created. The court below said that there was a sole and separate use, and the husband was not entitled to curtesy therein, relying on the English doctrine. Reversed, on appeal, the Supreme Court not noticing that there was no sole and separate use under the Pennsylvania law. *Ege v. Medlar*, 82 Pa. 86 (1876), going on the ground that the question was one of intention, but that no intention to exclude was to be found in the settlement. *Rank v. Rank*, 120 Pa. 191 (1888); *Carson v. Fuhs*, 131 Pa. 256 (1889), *dictum*; *Johnson v. Fritz*, 44 Pa. 449 (1863), right recog-

law which now exists in Pennsylvania as to the right of the husband to his estate by the curtesy: (1) that on the maxim that equity follows the law, statutory provisions as to the devolution of the woman's legal estate, and the rights of her husband therein, must apply equally to the devolution of her equitable estate;⁴ (2) that the donor cannot create a fee and remove therefrom any of the legal incidents thereof. He cannot impose inconsistent conditions.⁵ The result of this change of doctrine is that equity now follows the law. The Act of April 11, 1848,⁶ applies as well to the devolution of the separate equitable estate of the married woman as to her legal estate, and the rights of the husband in each case, after the death of the wife, are the same. It is sometimes said that the exclusion of the right of the husband depends on the intention of the donor as expressed in the settlement.⁷ This is a survival of the English doctrine,⁸ and it is submitted that this statement of the law is a fallacy.⁹ The right as tenant by the curtesy attaches to the fee. It is a question of intention whether the testator created a fee or a life estate, but that question having been determined the statutory right attaches, and no intention, no matter how strongly expressed, can exclude it. The question is whether the statute applies to a certain set of circumstances. It is a question of intention whether the donor creates one set of circumstances or another. It might possibly be said, therefore, that he indicated his intention as to whether the statute should apply by creating or not creating the circumstances to which the statute was applicable. To attribute such logical foresight to the donor is entirely out of the question, and unless the phrase is used in such a sense it is misleading and incorrect.

nized but husband estopped; court said that evidence that husband was estopped ought to have been received. *Jourdan v. Dean*, 175 Pa. 599 (1896), dictum. If she has merely a life estate, he, of course, takes nothing; *Schafer v. Eneu*, 54 Pa. 304 (1867). Dictum, *Clark, J., Shalters v. Ladd*, 141 Pa. 349 at 359 (1891). For a case where the husband asserted his right in the case of an ordinary trust, see *Morton's Estate*, 24 Super. Ct. 246 (1904).

⁴ Traces of this reason are to be found in *Dubs v. Dubs*, 31 Pa. 149 (1858), dictum.

⁵ Traces of this reason are to be found

in *Rank v. Rank*, 120 Pa. 191 (1888). See *Lewin, Trusts*, 8 ed. (1888), Vol. 2, p. 735.

⁶ P. L. 536, §9, as to personal estate, and §10 as to real estate.

⁷ See *Pepper & Lewis's Digest of Decisions*, Title "Curtesy," Vol. IV, col. 6135.

⁸ See §600, ante.

⁹ See remarks of Lowrie, C. J., in *Thornton's Ex. v. Krepps*, 37 Pa. 391 at 393 (1860). This same fallacy noted §119, ante, with respect to the application of the statute of uses.

Right of the Husband in the Sole and Separate Use When the Subject Matter is Personal Property

602. As to personal property it seems to have been settled without any discussion that the husband is entitled to his rights under the Act of 1848 in all personal property held absolutely to the sole and separate use of his wife, and any provision to the contrary in the settlement is of no effect.¹⁰

Right of the Husband Where the Estate of the Wife is Subject to an Executory Devise

603. No case has been found as to the right of the husband to his estate as tenant by the curtesy in the case of the sole and separate use of real estate subject to an executory devise. In the case, however, of *Thornton's Executors v. Krepps*,¹ it was decided that the husband was entitled to his estate as tenant by the curtesy in a legal fee vested in his wife, although subject to an executory devise in the event of death without issue. Where there is an absolute gift of personal property subject to an executory bequest the right of the husband is defeated by the happening of the event upon which the executory bequest is to take effect.²

Summary of the Law

604. It may, therefore, be said that the husband is entitled to his estate as tenant by the curtesy and his rights under the intestate laws in real and personal estate held for the separate use of his wife, and in which she has an absolute interest, with the question open as to the effect of an executory desire or bequest.

The Author's Observations on the Peculiar Pennsylvania Doctrines Relating to the Sole and Separate Use

605. While the law as to contemplation of marriage is well settled, it may not be out of place to examine the reasons

¹⁰ *Faries' App.*, 23 Pa. 29 (1854); *Van Rensselaer v. Dunkin*, 24 Pa. 252 (1855); *s. c.* sub nom *Sill's App.*, 1 *Grant's Cases*, 235; *Talbot v. Calvert*, 24 Pa. 327 (1855); *Page's Est.*, 75 Pa. 87 (1874). It is doubtful whether there was a sole and separate use created in this case, al-

though the court assumed that there was one.

¹ 37 Pa. 391 (1860).

² *Gormley's Est.*, 154 Pa. 378 (1893). The court said that the gift over was a contingent remainder, as to which see §100, ante.

upon which it is founded. Where a woman contracts with her husband on the eve of marriage for the enjoyment of her estate to her sole and separate use, it is plain that the arrangement is valid only for that particular marriage, is terminable by the woman upon subsequent discoveriture; and is invalid as against a subsequent husband, for it is clear that a man who marries a widow cannot be deprived of his marital rights because of a settlement which she may have made with a previous husband,³ and it is also plain that such a settlement is valid only when made in contemplation of a particular marriage, for the consent⁴ of the intended husband is necessary. Where, however, the sole and separate use is created by a third person the case is different. All that the woman receives is an equitable separate estate which, when it comes into her hands, is held free from the control of her husband. While, therefore, she may, so long as she remains single and if she has the entire interest, put an end to the trust, as it is a restraint upon her power of free alienation, yet so long as she does not terminate it the trust remains, and so long as it remains it must remain in its entirety. When, therefore, she marries with the trust in force, the husband takes her with the estate as she had it, and her power to terminate ceases during the marriage for the reason that she has thus voluntarily brought herself within the incapacity contemplated by the trust, and there is no more reason for holding the trust invalid in such a case than there is a trust newly created while she is married. It seems, therefore, as if the doctrine as to contemplation of marriage by the donor and the doctrine that the trust is terminable upon discoveriture and does not revive upon a second marriage, were borrowed from the first method of creating a trust, and were then applied indiscriminately to all cases of a sole and separate use. This confusion appears to have crept into the Pennsylvania law under a misapprehension as to some early dicta and without the question ever having been argued or discussed. The cases are as follows:

³ See *Freyvogel v. Hughes*, 56 Pa. 228 (1867); see §590, n. 10, ante

⁴ If the married woman's property acts have divested the rights of the husband during coverture, it is difficult to see why the feme sole cannot make a settlement to her sole and separate use which will be valid during the marriage against a future

husband. The invalidity as to such a husband before the acts depended on the fact that it deprived him of his marital rights during her lifetime, and since it no longer does so, as he has no rights, why has he any standing to complain? See *Belt v. Ferguson*, 3 Grant's Cases, 289 (1859), where, however, the point was not discussed.

Smith v. Starr

606. In *Smith v. Starr*⁵ the husband was dead and the widow had agreed to convey. The court said that the continuance of the trust after the death of the husband was a void restraint on her power of disposition of the fee; that the deed was an act of disposition by her. The subject matter being real estate, there is room to argue that the statute executed the use.⁶ Rogers, J., said, speaking of the doctrine that a trust could not be created for a feme sole unless she was in immediate contemplation of marriage, "But this doctrine would impose an unreasonable restriction upon the power of parents to provide for the future support of their daughters, and is not, as I conceive the law, as applicable to this state."⁷

Hamersley v. Smith

607. In the case of *Hamersley v. Smith*⁸ the fund consisted of personal property, and the cestui que trust became discoverd and married again. Gibson, C. J., in his opinion, after referring to the fact that an agreement for a separate use lasted only during the particular marriage because founded on the consent of the husband, came to the conclusion that the same rule applied to the case at hand, without, it is believed, clearly apprehending that the case before him was a gift from a third person.⁹ It is also submitted that the

⁵ 3 Whart. 62 (1838).

⁶ See §129, ante.

⁷ At p. 66. This remark of the learned judge was misunderstood by Agnew, J., in *Wells v. McCall*, 64 Pa. 207 at 213 (1870), where he said, "But on all hands it is admitted that the entire freedom of disposition would impose an unreasonable restriction upon the power of a parent (or indeed any other benefactor) to provide for the future support of a daughter. And Rogers, J., says precisely this in *Smith v. Starr*." Freedom of disposition in this sentence must mean freedom on the part of the cestui que trust, otherwise it is nonsense, and if it means freedom on the part of the donor it is not much better, as he can restrain or not, as he thinks best.

⁸ 4 Whart. 125 (1839).

⁹ Another instance of this confusion is furnished by the decree in *Ash's App.*, 80 Pa. 497 (1876). In that case an unmarried woman executed a deed of trust of her property in April, 1856. She married in April, 1857. In 1873 she and her husband filed a bill against the trustees, under the deed, to have the trust terminated. The bill set out that the plaintiff was not contemplating marriage when she executed the deed. The answer of the trustees admitted that fact. Paxson, J., in the court below, considered this admission as of no weight, citing *Wells v. McCall*, 64 Pa. 207 (1870), §432, ante, without observing that that was a case of a settlement by a third person. On appeal, the Supreme Court affirmed, placing the decision, however, on the ground that the trust was ac-

learned judge misunderstood the case of *Massey v. Parker*.¹⁰ He said that that case decided that the gift of a separate use to an unmarried woman was impracticable. On the contrary, the case simply decided that the clause against anticipation attached to a married woman's trust could be disregarded by her when she was not married. Since in England she has all the powers which are not denied her, it is apparent that in that jurisdiction to disregard the clause against anticipation does not destroy the trust. In Pennsylvania, however, where she has only those powers given to her in the instrument creating the trust, it is a far cry from the decision in *Massey v. Parker* to say that merely because the woman becomes discoverd the whole trust falls to the ground. The learned judge also relied on the case of *Smith v. Starr*, overlooking the fact that that was a use of real estate executed by the statute of uses.

Reasons Assigned by the Supreme Court

608. A number of reasons have been assigned by the Supreme Court for this doctrine. (1) "Perhaps a reason for the fall of this kind of trust is that the donor having expressed coverture as its purpose, no other intent is presumed."¹

tive and the remainders legal, and therefore the cestui que trust was not entitled to the legal title.

¹⁰ *Massey v. Parker* 2 M. & K. 174 (1834). The dictum in this case is very obscurely worded, but seems to go only to the point that a restraint upon alienation is invalid as against the subsequently taken husband of the cestui que trust. The court said that as the woman while sole could disregard the restraint, there can be no reason why she could not give it to her husband by the act of marriage. It may also be gathered from the opinion of Lord Cottenham in *Tullet v. Armstrong*, 4 Myl. & Cr. 377 at 399, 400 (1840), s. c.; 1 Beav. 1 (1838), that the point really involved in the dictum of *Massey v. Parker* was that the restraint against anticipation was invalid only during subsequent coverture. In *Tullet v. Armstrong* a testator gave property to trustees in trust for his

wife for life, with the remainder to M. A. T., then a feme sole, without anticipation and free from the control of her husband. M. A. T. was unmarried on the date of the death of the testator, but married in the lifetime of the widow. Held, that the separate use clause and restraint against alienation became effective at her marriage, the Master of the Rolls, Lord Langdale, pointing out on p. 29 the dictum in the case of *Massey v. Parker*.

¹ Agnew, C. J., in *Earp's App.*, 75 Pa. 119 at 125 (1874). The learned judge probably had in mind the operation of the statute of uses. See §129, ante. Contrast this language with that of the same judge in *Wells v. McCall*, 64 Pa. 207 at 213, where he evidently makes the trust fall because it is itself a restraint on alienation, which restraint can only be imposed so long as the necessity exists.

(2) That when the marriage is known, the donor has the data upon which to base an intelligent judgment as to the propriety of creating the trust.² This reason, it is submitted, loses its force when it is remembered that the trust has for its object the protection of the woman against the uncertainties which attend every marriage, however auspicious. (3) That as the sole and separate estate is one in which the cestui que trust has no powers except those granted, it is necessary to restrict the persons for whom such an estate may be created, for if the estate could be settled upon every single woman, the free alienation of property and the transmission of title would thereby be most seriously embarrassed.³ This reason, however, is of no weight when assigned in a jurisdiction like Pennsylvania, where, if anywhere, the restrictions upon alienation which may be created are allowed to the greatest extent, and is inconsistent with that assigned by Mr. Chief Justice Gibson.⁴

² Sterrett, J., in Snyder's App., 92 Pa. 504 at 509 (1880).

³ Clark, J., in Quin's Est., 144 Pa. 444 at 455 (1891).

⁴ There appears to be no discussion in the books at the time the doctrine was established as to the reason why the woman should be married or in contemplation of

marriage except in the opinion of Smyser, P. J., in the court below, in Dubs v. Dubs, 31 Pa. 149 at 151 (1858). In that case the Supreme Court seemed to think that the other view was the English view, and, for that reason alone, viewed it with disfavor.

CHAPTER 25

ACCUMULATIONS

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Accumulations Defined and Analyzed

615. An accumulation as used in this discussion, is a retaining or heaping up of the income of property, and this may occur in one of three ways: (1) where the owner of property who is sui juris himself saves his income; with this the law does not undertake to deal, and it requires no further discussion.¹ (2) Under some policy of law, where the owner of

¹ As the accumulation in this case takes place as to a vested interest it cannot violate the rule against perpetuities, and

as it continues by the voluntary act of the party entitled to the income, it does not amount to a restraint on either alien-

property is incapacitated from taking care of the income himself, as where he is a minor, a lunatic, or an habitual drunkard.² (3) Where the owner of property, by will or deed, settles the property in such manner that there is an accumulation of the income thereafter accruing. The last case is the subject of the discussion in this chapter. Such an accumulation must necessarily result because of some direction in the instrument of gift. These directions may be of two kinds, implied or express.³

Preliminary Discussion of Implied Directions to Accumulate

616. An implied direction to accumulate income exists when the limitations in the settlement are such that there is no one who has a present right to the property producing the income. In some of these cases, the court has adopted a rule of construction that the settlor intended the income to accumulate

ation or use and enjoyment. As there is no other principle of law applicable to such accumulation, it is limited only by the voluntary wish of the party entitled.

² An accumulation taking place under some rule or policy of the law is not strictly within the scope of this book. It will be proper, however, to give the subject some attention in passing. A minor is incapacitated by law from alienating his estate or spending the income thereof, and so much as is not necessary for his education and maintenance must be accumulated by his guardian or the trustee of the estate until he arrives at the age of twenty-one. Such accumulation is directed by law and of common occurrence. The error of Lord Eldon in *Griffiths v. Vere*, 9 Ves. Jr., 127 (1803), in saying that it was directed by the court, was pointed out by Lord Cranworth in *Tench v. Cheese*, 6 DeG. M. G., 453 at 463 (1855), quoted in *Scott on Accumulations* §103. An accumulation may take place for several generations, as where several successive owners of an estate die under age, each leaving an heir or person entitled who is also under age. In all these cases there can be no doubt that the

income will be accumulated during the successive minorities; *Griffiths v. Vere*, supra. The surplus income of a lunatic or habitual drunkard is, in like manner, subject to accumulation in the hands of his committee; see article, *The Surplus Income of a Lunatic*, Russel and Hale 8 Harv. Law Rev. 472-493 (1895).

³ It is important to notice that accumulations may exist, without any direction to that effect, from the circumstances of the case; as where the income accumulates in the hands of an executor or administrator, pending proceedings upon his account on appeal; from the fact that the party entitled to the income permits it to remain in the hands of the trustees or the trustees retain it through negligence or breach of trust; and also where the income accumulates because the party entitled is absent and unheard of, and cannot be found to receive payment. The student will therefore observe that the difference is not in the accumulations themselves but in the cause of their existence. An accumulation as such is not therefore necessarily unlawful. It may or may not be unlawful; see §683, post.

until the time of vesting. No such rule was necessary at the common law in the case of real estate, as owing to the common law doctrine of seisin⁴ there was always some one who had a present right to the rents and profits.⁵ When the validity of the executory devise was admitted,⁶ there was a possibility that there might be a gap in the ownership, and there was room, in such case, to apply the rule of construction. The application, however, of the rule that a limitation of real estate must be construed as a remainder whenever it is possible to do so,⁷ makes the cases where there is a gap in the ownership of real property of rather infrequent occurrence. No such case has been found in Pennsylvania, and is extremely unlikely to arise in modern times. Our remarks, therefore, as to these rules of construction will be confined to gifts of personal property.

*Rules of Construction Applicable to Disposition of Income on
Gifts of Personal Property*

617. Where there is a bequest of the residue or a portion thereof, upon a future contingency, the rule of construction is that there is an implied direction to accumulate the income accruing on the residue until the happening of the contingency. Where there is a general legacy the income begins to run from the time the legacy is payable, which, by Act of February 24, 1834,⁸ is one year from the testator's death, unless he has provided a different time.⁹ The income accruing on the legacy until the time of payment goes to the residuary legatee, and there is no reason to imply a direction to accumulate.¹⁰ Where there is a vested gift of the residue, the income begins to run immediately from the death of the testator without any direction to that effect, and in such case no question of accumulation is presented.¹

⁴ As to this, see §39, ante.

⁵ Fearn, Remainders, p. 538, Butler's Note.

⁶ See §78, ante.

⁷ See §78, n. 3, ante.

⁸ P. L. 70, §51; see remarks of Lamorelle, J., in Robinson's Est. 16 D. R. 31 at 33 (1906).

⁹ There are some exceptions to this rule which do not concern us in this discussion.

¹⁰ Nicholson's Est., 18 Phila. 45 (1886); in Kerr v. Bosler, 62 Pa. 183 (1869), the court said the legacy was vested, payable at twenty-one, but that nevertheless the legatee was not entitled to interest until the time of payment; see Bird's Est., 2 Pars. Eq., 168 (1851) Weimer's ed., 179, note; Hargrave, Thellusson Act p. 44, n. 1 (1842).

¹ This is illustrated by the case of Bayard v. Atkins, 10 Pa. 15 (1848), where

Annuities

618. Where there is a gift of an annuity the testator may make the annuity a primary charge on his estate and direct that if there is an insufficient income in any one year to pay the annuity the deficiency shall be made up out of the income of the next or ensuing years, or he may provide that the annuity shall only be payable out of each year's income and that the deficiency shall not be carried over into the next year. In most cases a testator will omit any provision as to this particular point, and there is often room for construction as to what his intention was.² In no case, however, does there seem to be room to imply a direction to accumulate the whole or part of the income of any one year to make up any deficiency in the next year's income. A gift of the sum necessary to produce a certain annual amount seems to be equivalent to a direct gift of an annuity.

Express Directions to Accumulate Income Defined and Analyzed

619. Express directions to accumulate may be (1) where there is a contingent gift of the income depending on the accumulations;³ (2) where there is a vested gift of the income with a direction to accumulate engrafted thereon.⁴ It is often difficult to distinguish between the two cases. This preliminary question of construction, however, must be attended to before any attempt can be made to apply the law to express directions to accumulate.⁵

there was a gift of the residue, in trust, to use so much of the income as might be necessary for the maintenance of Thomas, a son, for life, until he should arrive at twenty-one, and thereafter, to pay him the whole income, with power to dispose by will, if he reaches twenty-one, and if he dies under twenty-one, the residue to be paid to the heirs at law of the testatrix. Here was a vested interest subject to be divested upon certain contingencies, and the court very properly held that Thomas would be entitled to the income until the contingency, and therefore a petition by his guardian for an order of maintenance out of the income was allowed.

² See *Sell's Est.*, 4 W. N. C., 14 (1877);

Brewster's App., 7 *Sadler's Cases*, 604 (1878), s. c. 45 L. J. 164, 35 *Pitts. L. J.* 449, 12 *Atlan.* 470; *Denis's Est.*, 169 Pa. 493 (1895); *Rudolph's App.*, 10 Pa. 34 (1848).

³ Thus, in the case of a gift in trust to accumulate the income during the life of A., and at his decease to pay the accumulations to B.

⁴ As a gift in trust for A. for life, with direction to accumulate one-half of the income and pay A. the accumulations in every fifth year during the continuance of the trust.

⁵ See §680, et seq., post, for further observations on this point.

Where the Gift Depends on the Accumulation—How Limited

620. Where there is a gift of the accumulated fund, the gift depending on the accumulation, the interest of the donee may be vested or contingent; when vested, it is construed as an immediate gift of the income with a direction to accumulate engrafted thereon;⁶ when contingent, the gift may violate the rule against perpetuities, which will be (1) where the accumulation will not be accomplished until a remote period; (2) when although the accumulation may be finished in time, the gift is to take effect upon a contingency which is remote.

Where the Direction to Accumulate is Subsidiary to the Gift—How Limited

621. Where there is a vested gift of the income with a direction to accumulate engrafted thereon, the direction is a restraint on the enjoyment of the income by the party in whom it is vested, and it is apprehended that the direction is void under the general principle of public policy forbidding restraints on the enjoyment of property.⁷ It does not violate the rule forbidding restraints on alienation, because the right of the cestui que trust, whatever it may be, is freely alienable, notwithstanding the direction to accumulate.

Reason For Separate Discussion of Accumulations

622. If the foregoing discussion contained all the law relating to accumulations, the subject would present no special difficulty and the matters which we have noticed could have been taken up in their proper place, in the earlier parts of this book. The reason for the separate discussion lies in the circumstance that the statute against accumulations⁸ confines directions to accumulate within closer lines than those prescribed by the common law. Almost the entire law on the subject at the present time turns on the provisions of this act. It will, therefore, form the text of the remaining part of the discussion in this chapter.

The Statute Against Accumulations

623. The remarkable provisions of the will of Peter Thellus-

⁶ As to this, see §692, post.

⁷ See Part IV, ante.

⁸ Act of April 18, 1853, P. L. 503, §9.

See §623, post.

son, who died in 1797,⁸ led to the passage in England of the Statute of 39 and 40, George III,⁹ generally known as the Thellusson Act.¹⁰ This legislation was designed to still further limit the period during which, and the objects for which, accumulations could be directed. The statute was partially enacted in Pennsylvania by the Act of April 18, 1853.¹ The Pennsylvania and English acts are given in parallel columns in the note.²

⁸ See *Thellusson v. Woodford*, 4 Vesey 227 (1798); 11 Vesey, 112, 1 New Report, 357, Hargrave on the Thellusson Act, (1842), where a complete history of the case will be found.

⁹ c. 98, (1800)

¹⁰ Sometimes known as the Lord Loughborough Act; Hargrave on the Thellusson Act, p. 1 (1842); called by Strong, J., in *Brown v. Williamson*, 36 Pa. 338 at 341 (1860), the Ripon Act.

¹ § 9 P. L. 503.

PENNSYLVANIA ACT

² "That no person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interests or profits thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler or testator, that is to say, only after such decease

(Omitted from Pennsylvania Act)

during the minority or respective minorities, with allowance for the period of gestation, of any person or persons who, under the uses or trusts of the deed, will, or other assurance directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, in so far as it shall exceed the limits of this act, and the rents, issues, interests and profits so directed to be accumulated, contrary to the provisions of

ENGLISH ACT

"That no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated; for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, deviser or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to

PENNSYLVANIA ACT

this act, shall go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed: Provided, That any donation, bequest, or devise, for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made; And provided, That notwithstanding any direction to accumulate rents, issues, interest, and profits, for the benefit of any minor or minors, it shall be lawful for the proper court, as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectations, whether, at the time being, minors or of lawful age.

ENGLISH ACT

be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

(Not in the English Act.)

(English act provides that it shall go into effect as to persons dying twelve months after the passage of the act.)

(Not in English Act.)

II. Provided always, and be it enacted, That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed.

III. Provided also, and be it enacted, That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.

IV. Provided also, and be it enacted, That the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and

General Distinction Between the English and Pennsylvania Acts

624. The Pennsylvania act is a clumsy copy of a portion of the first section of the English act, containing two provisions not found in the English act, and making a change in the time of going into effect. It will be observed that the English act provides that no direction to accumulate shall be valid unless during the life of the grantor, *or* a term of twenty-one years, *or* during minority, etc., so that the whole effect of the English act is to limit the time during which an accumulation may be directed, and as to the objects within that time there is no limitation whatever, and the proviso³ permits, as to the objects therein designated, accumulations not limited by the time prescribed in the first section. Under the construction put upon the English act, only one of these four periods may be taken.⁴ In the Pennsylvania act, on the other hand, no such alternative is provided. The first, second and fourth periods of the English act are thrown together, omitting the third period, and connecting the first and second clauses by the word "and" and the second and the fourth by the words "that is to say, until after such decease," the effect of which clumsy language is to give the settlor the choice only of one period, that is, the life of the grantor and twenty-one years thereafter.

The Pennsylvania Act Examined in General

625. By the first clause, all directions to accumulate are

executed before the passing of this Act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of this Act."

The St. 55 & 56 Vict. c. 58, cited as the Accumulations Act, 1892, added the following provision to the Thellusson Act: "No person shall, after the passing of this act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who, under

the uses and trusts of the instrument directing such accumulation would, for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." The foregoing quotations from the English act are taken from Gray, *Rule Perp.*, 2 ed. (1906), pp. 514, 515.

³ In §2.

⁴ See Gray, *Rule Perp.*, 2 ed. (1906), §695.

prohibited in sweeping terms. By the provisos, certain directions are permitted. Directions to accumulate were, before the act, governed only by certain rules of law.⁵ These rules of law are still in force, consequently a direction to accumulate, which, although within a proviso is void under such rule, is still invalid as much as it was before the act. The proviso permitting directions to accumulate did not make lawful those directions, which while within the proviso, were before invalid. As has been said, a direction to accumulate may be invalid *de hors* the act.⁶ This distinction is important, as it is necessary to clear thinking to distinguish between a direction to accumulate which is in conflict with the act, and one which is void anyhow.⁷

*The Act Considered in Connection With the Rule Forbidding
Restraints on Alienation*

626. It is plain that if the contingent gift depends on the accumulation, the donee has an interest which may or may not be alienable, and that the alienability cannot depend in any way on the circumstance that the interest is to take effect when the accumulation is accomplished. When the gift is

⁵ See §§626, 627, 628, *post*.

⁶ Hargrave, *Thellusson Act*, p. 91 (1842). Mr. Lewis, *Perp.* (1843), p. 593, puts the point very well as follows: "The act, however, being one of a restraining force, it was evident that it could not affect or give any increased efficiency to trusts of accumulation expressly or possibly extending over a longer period than that allowed by law for the limitation of future estates. The act could only apply to provisions for accumulations, valid independently of it, which was not the case with respect to trusts exceeding or not confined to the period of remoteness prescribed by the perpetuity rule."

⁷ Mr. Hargrave says, *Thellusson Act*, p. 40, n. (1842), that the act is a restraining statute considered with reference to alienation by the owner of property in any case; yet considered with reference to alienation in the abstract, it is an enabling act. It is to be observed that as a

direction to accumulation involves a restraint on the donee, the statute is so far as such directions are removed, an enabling statute as to those persons entitled to the income directed to be accumulated—it is a restraining statute considered from the point of view of the donor, and an enabling statute considered from the point of view of the donee. Paxson, J., in *Washington's Est.*, 8 Phila., 182 (1871) said, at 185, "It is further to be observed that this act is in derogation of the common law right to dispose of property, and must be construed strictly. Any interpretation of it not expressly authorized by its terms must be rejected. To enlarge its scope would be legislation, and this is beyond the power of the judiciary." Since the act first prohibits all directions to accumulate, and by the proviso permits some, the proviso is not in derogation of the common law. The learned judge does not point out whether he has in mind the proviso or the act as a whole.

vested the direction to accumulate can have no effect upon alienation, and as has been pointed out,⁸ the accumulation can be stopped by the donee under another rule. The act, therefore, does not in any way touch the rule forbidding restraints on alienation.

The Act Considered in Connection With the Rule Against Perpetuities

627. The particular in which a direction to accumulate violates the rule against perpetuities has already been pointed out.⁹ The statute against accumulations, therefore, still further limits the period prescribed by the rule against perpetuities, so far as directions to accumulate are concerned.

The Act Considered in Connection With the Rule Forbidding Restraints on Enjoyment

628. When the contingent gift is dependent on the accumulation, no question as to restraint on enjoyment can arise, because there is no right to enjoy until the interest is vested. Where the direction to accumulate is engrafted on a vested gift, the direction is void as a restraint on enjoyment. In this respect the statute is coextensive with the rule forbidding the imposition of restraints on use and enjoyment. Although no authority on the point has been found, it is apprehended that such a direction would have been void before the act was passed.¹⁰

Cases on Accumulation Before the Act

629. Very few cases on accumulation arose in Pennsylvania prior to the Act of 1853, and as that act probably contains all the law on the subject the earlier cases, with one exception, are practically obsolete and require no special comment.¹

⁸ See §§621, ante, 628, post.

⁹ See §620, ante.

¹⁰ See §621, ante.

¹ In *Ashhurst v. Given*, 5 W. & S., 323 (1843), see Gray, *Restraints on Alien.*, 2 ed. (1895), §223, there was a direction to accumulate the profits of the trust during the lifetime of the trustee for the

benefit, at his decease, of his children, the ultimate remaindermen. The direction to accumulate was held to be valid; see *Brown v. Williamson*, 36 Pa. 338 (1860), stated §631, post; an identical case arising after the act. In *Kelso v. Dickey*, 7 W. & S. 279 (1844), there was a direction to accumulate until the bene-

*Preliminary Discussion of Directions to Accumulate Which are
Valid Under the Act*

630. We shall first ascertain what directions to accumulate are valid under the act. It is necessary to approach the subject from this point of view because the act starts out by prohibiting all directions to accumulate, and then allows, by a series of provisos, certain exceptions to the general rule previously laid down. The subject can best be understood by taking up the cases in chronological order.

Brown v. Williamson

631. In *Brown v. Williamson*² the testator gave one-third of his estate to his son, in trust, to hold the same during his life and out of the profits to make investments for the same uses and trusts, to wit: for the use of such children as F. might have at the time of his death, and if he should die without issue, then for the use of those who should then be the testator's heirs, with a further direction that F. should have a reasonable support out of the trust fund for personal services rendered. The case arose on a proceeding by the son's creditors to attach the trust estate. The attachment was served on the executors of the testator, from which it seems that the trust fund had not yet been handed over to F. The court said that the question was whether the interest of F. in the trust fund was liable to such attachment. It was argued, on behalf of the creditor, that the direction to accumulate was void, and therefore the interest was vested in F. absolutely. The court said that the trust might be transgressive, but that the act avoided only the excess in transgressive trusts, and the interest of F. could not be attached.³ It is submitted that the court overlooked the

ficiary should reach twenty-five, which was apparently acquiesced in by all parties. In *McKee's App.*, 96 Pa. 277 (1880), Gordon, J., at 284, said that before the act of 1853, accumulations as necessarily and naturally formed part of the original estate as vegetable accretions form part of the growing plant. In *Holloway's Est.*, 11 Pa. C. C. 90 (1892), the will was dated and proved prior to the act, consequently act did not apply; see remarks of Hanna, P. J., on p. 94, where

there is a misprint of 1855 for 1853. In this case there was a direction to pay out the income in the construction of houses on the testator's vacant lots, which would be clearly void since the act. *Hillyard v. Miller*, 10 Pa. 326 (1849).

² 36 Pa. 338 (1860).

³ Mr. Gray, *Rule Perp.*, 2 ed. (1906) §717, n. 2, makes the following observation on this case: "The court seem to have overlooked the fact that under the Pennsylvania statute accumulation is

force of this argument, which, more accurately stated, amounts to this: the direction was to accumulate the fund and pay it at a certain time to the persons designated. The gift was void, and there was, therefore, a resulting trust of the whole income to the heir at law, and the interest of Francis in this resulting trust was liable to be attached. He would, however, be entitled only to share equally with the other heirs, if any, and not, as was argued, to take the whole income. The case decides, therefore, that a direction to accumulate during the life of a certain person, and to pay the accumulation to his children, is valid and not within the statute.⁴ The case is probably overruled, but it is necessary to notice it as it does not appear to have been accurately understood, and it is frequently cited as an authority.

Washington's Estate

632. In *Washington's Estate*⁵ there was a direction to accumulate the income of a minor over and above a certain annuity which was to be paid to her, and to add the accumulations to the principal of the estate on the arrival of the minor at twenty-one. A petition was presented by the guardian of the minor, which set forth that there were large accumulations of income, beyond the amount directed to be paid for her maintenance, and that the petitioner was advised that upon her arrival at age, she would be entitled, under the Act of April 18, 1873 (a misprint for 1853), to receive the whole income of the estate, and praying for an increased allowance for the use of the minor.⁶ The trustee answered that the minor was not entitled to the additional allowance under the

allowed only during the actual minority of a person who would be entitled to the income, if of full age. It does not appear that A. (Francis' children) were minors, and they were certainly not entitled to the income until the death of A."

⁴ Penrose, J., in *Grim's Est.*, 12 W. N. C. 354 at 356, (1882), said that this case expressly admitted that the trust for accumulations was invalid, the point decided being that such invalidity did not extend to the entire trust, of which the direction to accumulate was only an incident. The court, however, only said that

the trust might be transgressive, and if the direction to accumulate was void the creditors should have recovered; said by McCullum, J., in *Edwards's Est.*, 190 Pa. 177 at 180 (1899), without giving any reason, not to be within the Act of 1853, and that the case did not decide that the trust was transgressive.

⁵ 75 Pa. 102 (1874); 8 Phila., 182 (1871).

⁶ Trunkey, J., in *Carson's App.*, 99 Pa. 325 at 329 (1882), understands the case as going on the point as to whether she was entitled to the accumulations on coming of age.

act, and that the accumulations were not for the benefit of the minor but for the benefit of the remaindermen.⁷ The Orphans' Court decreed the additional allowance asked for, and, on appeal, the decree was affirmed by the Supreme Court. The opinions of the judges, Paxson, J., in the Orphans' Court, and Gordon, J., in the Supreme Court, are difficult to understand. The grounds of decision seem to be as follows: Paxson, J., in the court below,⁸ said that the court would have no authority to decree an allowance if the accumulations were to go to some one else than the minor, and, therefore, since they have that authority by the proviso, the accumulations must go to the minor, and that it is no answer to this to say that the proviso only applies to one of the cases of accumulation permitted by the act, (to wit, when an accumulation is intended for a minor,) and in other cases makes no such provision, for the reason that the act permits no accumulation except during the minority of the person entitled to the fund, and "evidently contemplates the payment of the principal to him at his majority."⁹ In this he overlooked the fact that the very purpose of the proviso was to give this authority to the court, and as they had the authority before to decree an allowance out of the minor's income, the proviso would be meaningless unless the legislature contemplated a gift over of the accumulations to a stranger. And then, at the conclusion¹⁰ of his opinion, the learned judge said that the facts of the case justified an increased allowance, and as the sum asked for would not exceed more than one-half of the income, there was no good reason why the prayer of the petition should not be granted. In the Supreme Court, Mr. Justice Gordon seems to base his decision upon the ground that the direction to add the accumulated income to principal was void. He said:¹¹ "Any attempt to direct such accumulations into any other channel renders the deed or will void *pro tanto*, and the rents or profits so appropriated pass to the person or persons who would have been entitled thereto, if such accumulation had not been directed," and, further, that it would be a contradiction in

⁷ There was a further question of fact raised in the court below as to the necessity for the additional allowance, which seems to have been concluded in favor of the necessity.

⁸ 8 Phila. at p. 187.

⁹ The language of the learned judge is so obscure that very little confidence is felt that his exact meaning has been grasped.

¹⁰ On p. 190.

¹¹ 75 Pa. 106.

terms to say that the income of the minor can be accumulated during minority, and then, when the minor comes of age, give the accumulation to some one else. There was no contradiction in terms. The gift took a portion of the income away from B. and gave it to A., and the court overlooked the fact that when the statute permitted a direction to accumulate during that period, it also permitted a disposition of that accumulation. In other words, that the act only prescribed the time during which an accumulation might be permitted, and marked out that time by the specification of a certain minority and a certain income, and necessarily left free to the testator the right to dispose of the accumulations in such manner as he saw fit when the period during which they might be directed had expired. The case has been severely criticised,¹² and the grounds of decision seem to be unsound. The case really only decides that where there is a direction to accumulate the income of a minor, the guardian may have an adequate allowance decreed thereout. The dictum of the case is that the direction to add the accumulation to principal is void.

Williams's Estate

633. In *Williams's Estate*¹ there was a bequest to an executor, in trust, for the son of the testatrix, who had sailed from New York on a particular vessel, and of whom no tidings had been heard for many years, in case he could be found, after diligent inquiry, correspondence and advertising for the space of twenty full years after her decease, with remainder over. The case is badly reported, and it is difficult to tell what was the real point involved. Hanna, P. J., said that

¹² Penrose, J., in *Grim's Est.*, 12 W. N. C. 354 at 356 (1882); Trunkey, J., in *Carson's App.*, 99 Pa. 325 at 329 (1882), said that probably *Washington's Est.* might have been decided the same way on another point but that it was not, for no other point was considered by the court below or in the Supreme Court. Mr. Gray, *Rule Perp.*, 2 ed. (1906), §717, says: "Suppose property is given in trust to pay the income to A. for life, and on A.'s death to transfer the principal to B., and there is a direction to accumulate the income during A.'s minority, and to add the accumulations to the principal. Such a direction

would certainly appear to be authorized by the Statute. If A. were of full age, he would be entitled to the income, and that is enough, according to the Statute, to make the accumulation lawful. If A. would get the income if over age, accumulations made while he is under age ought to be good to whomsoever they go, for there is nothing in the Statute requiring them to go to A. or any other person. Nevertheless, it has been held that such a direction is void altogether, and however little such a doctrine is justified by the Statute it is now settled."

¹ 13 Phila. 325, 8 W. N. C. 310 (1880).

the Act of 1853 was intended to make void all accumulations of income for longer than the life of the grantor or testator and twenty-one years thereafter, in this remark overlooking the qualification introduced by the dictum in Washington's Estate.² He then said that there was no direction to accumulate, and that the term was fixed at twenty years, from which it may be inferred that the learned judge thought that the accumulation in the case would be valid. It may also be inferred from his remarks that the act can only be taken advantage of by the parties entitled to the income directed to be accumulated, and that no question as to accumulation was before the court, since no such parties were claiming the accumulations. As the son was living in 1853, he was of the age of twenty-one years and upwards at the date of the death of the testatrix, which, according to the report in 13 Phila., was in 1876. This was a clear case of an accumulation of the income not for a minor and not of the income of a minor, and not to be sustained in any view.³

Conrow's Appeal

634. In Conrow's Appeal⁴ the testator created a temporary trust in the executors, by which the time of the enjoyment of the possession of the fee was postponed, to take effect when A., a son, should reach the age of twenty-five years. The case arose on a controversy between the trustees and the cestui que trust for rents of a property belonging to the trust estate. The court held that the trustee was entitled to the rent; that this was an active subsisting trust, and was not contrary to the Act of April 18, 1853, providing against trusts for accumulation. The fact that the trustee was entitled to the rent would not prevent the cestui que trust from claiming the accumulation. As A. was still a minor, there was another reason why no question concerning the accumulation was before the court. If there was a direction to accumulate, it was clearly void in so far as it applied to the income due A. between the time he reached twenty-one and the time he reached twenty-five. If the dictum went to this point it was probably erroneous.

² 75 Pa. 102 (1874), stated §632, ante.

³ Mr. Gray, Rule Perp., 2 ed. (1906), §717, n. 2, says of this case: "The case is blindly reported, but it would seem that

under the statute the income should have gone as intestate property."

⁴ 3 Penny. 356 (1883).

Prentice v. Pleasonton

635. In *Prentice v. Pleasonton*⁵ there was a gift in trust to pay certain specific legacies and accumulate the surplus income, if any, and divide the same, with the principal, upon the death of certain persons. There was a specific decree of the Orphans' Court entered, directing the trustees to accumulate in pursuance of the provisions of the will. The direction to accumulate was plainly void, and the decree of the Orphans' Court in that particular, improper, and the point was apparently overlooked by the court and counsel. It may be that no question as to the validity of the direction to accumulate was raised by anyone entitled to the income. If this was so, that part of the decree directing the accumulations to remain in the hands of the trustee, would be proper; that part, however, directing them to be added to principal, was improper, in any view of the case.⁶

Ward's Estate

636. In *Ward's Estate*⁷ there was a direction to accumulate and add the accumulations to principal. Two of the minor cestuis que trustent who were of age made an application at the audit of the trustee's account to have the principal distributed. The direction to accumulate was plainly void⁸ in so far as there was a direction to accumulate after any grandchild reached twenty-one and in so far as the direction to add the capital was concerned. Strangely enough, no question as to the accumulations was raised, although it is impossible to see how, if the grandchildren were of age and applied for the payment to them of the accumulated income, such application could have been refused. It may be that the trustees paid over the income directed to be accumulated without an order of court.

Levy's Estate

637. In *Levy's Estate*⁹ there was a gift of the principal in trust to pay the income for the support of testator's wife,

⁵ 6 Sadler's Cases, 90 (1887); see *Dugan's Est.*, 18 Phila. 89 (1886).

⁶ A similar decree seems to have been inadvertently entered in *Howell's Est.*, 5 W. N. C. 430 (1878).

⁷ 13 W. N. C. 282 (1883). See §350,

ante, as to the application of the rule against perpetuities.

⁸ Is not to be distinguished from the will in *Stille's App.*, 4 W. N. C. 42 (1877); s. c. 11 Phila. 31 (1875).

⁹ 153 Pa. 174 (1893); see §312, ante.

with the further provision that she was not to have power to dispose of the same by will, but that any portion of the income not used was to be considered part of the residuary estate. This, of course, amounted to a direction to accumulate the income, although not noticed by the court. The case arose on an application by the personal representatives of the widow, against the trustees of the husband's will, to receive the income which was accumulated and due at the time of her decease, and which had not been paid her. The court directed the payment of the accumulation to the representatives of the widow, on the ground that the subsequent clause, that she should have no power to will, was inconsistent with the previous gift of the life estate and void. The power to dispose by will is not a necessary incident of a life estate. The question, therefore, in this case was not whether the prohibition of testamentary power was valid or not, but whether the testator could direct that the income, which his wife did not take from the trustees before her death, should become a part of the residuary estate.

Summary of the Cases and Statement of Pennsylvania Law as to Valid Directions to Accumulate

639. Washington's Estate¹ is the leading case on the subject in Pennsylvania, and the dictum of the case, however illogical and objectionable the reasoning adduced in its support, has been buttressed by many subsequent decisions.² It cannot be reconciled, however, with the subsequent cases of Williams'

¹ 75 Pa. 102 (1874), stated §632, ante.

² A direction to pay certain annuities or a certain sum to a life tenant and accumulate the balance during the lifetime of the annuitant or the life tenant, is void; Grim's App., 109 Pa. 391 (1885), same will before the court on another point in Grim's Est., 12 W. N. C. 354 (1882); Rhodes' Est., 147 Pa. 227 (1892); McKee's App., 96 Pa. 277 (1880). An express direction to accumulate and no disposition of accumulations is void; Schwartz's App., 119 Pa. 337 (1888). Where the direction is to accumulate the income of a minor, the accumulations must be paid to the minor on arriving at age; Farnum's

Est., 191 Pa. 75 (1899). A direction by testatrix to accumulate the income of her estate until the death or probate of the will of her husband, is void: dictum, Penrose, J., in Brooks' Est., 140 Pa. 84 at 88 (1891). A direction to accumulate during the life of A., and pay the accumulations at her death to testator's brother and sisters is void: Matter of Sergeant, 11 Phila. 8 (1875); see also Martin's Est., 185 Pa. 51 (1898); Edwards's Est., 190 Pa. 177 (1899). A direction that surplus fund should be held to make up deficiencies in future years is void: Mitcheson's Est., 11 W. N. C. 547 (1882). A direction to accumulate until the

Estate³ and *Prentice v. Pleasonton*,⁴ or with the dicta in *Conrow's Appeal*⁵ and *Ward's Estate*.⁶ There are also a number of other dicta which are inconsistent with the decision in *Washington's Estate*, which are collected in the note.⁷ The weight of authority probably is in favor of the construction laid down in *Washington's Estate*, a construction which has at least the merit of simplicity. No income can be accumulated unless it is the income of a minor, and the accumulations must be paid to the minor upon arriving at the age of twenty-one.⁸

Must the Interest of the Minor be Vested for the Direction to Accumulate to be Valid?

640. If the gift of the income is contingent, it may vest in one not a minor, and consequently the direction to accumulate may turn out to be invalid under the act. No case deciding whether the direction is valid has been found.⁹ The

youngest child of A. shall reach twenty-one, and then pay the accumulations to the children of A. is void: *Mellon's Est.*, 16 Phila. 323 (1884); s. c. sub nom. *Gowen's App.*, 106 Pa. 288 (1884). Direction to accumulate until twenty-five, void as to all beyond twenty-one: *Young's Est.*, 16 D. R. 541 (1907).

³ 13 Phila. 325, s. c. 8 W. N. C. 310 (1880), stated §633, ante.

⁴ 6 *Sadler's Cases*, 90 (1887), stated §635, ante.

⁵ 3 *Penny*, 356 (1883), stated §634, ante.

⁶ 13 W. N. C. 282 (1883), stated §636, ante.

⁷ *Gordon, J.*, in *McKee's App.*, 96 Pa. 277, at 284 (1880), said: "The extreme period allowed for accumulations by the act is twenty-one years, with the additional allowance of the ordinary period of gestation. Here the time is indefinite. It may be much more than twenty-one years, for it depends on the life of Mrs. McKee." Traces of this dictum are to be found in *Schwartz's App.*, 119 Pa. 337 (1880) and *Edwards's Est.*, 190 Pa. 177 (1899). The dictum seems to give countenance to the probably erroneous notion that a direction for an indefinite period in

part violates the statute, and that a direction to accumulate for a definite period might be valid. In *Vastine's Est.*, 190 Pa. 443 (1899), the validity of a direction to accumulate until twenty-three was tacitly recognized; the point was not raised. In *Stephens v. Dayton*, 220 Pa. 522 (1906), *Mestrezat, J.*, said at 526 that the trust in that case did not violate the statute that prevents accumulations beyond the life or lives in being and twenty-one years thereafter; a statement so obviously erroneous that it must have been a slip of the pen on the part of the learned judge. For all that appeared in the report, which unfortunately is very imperfect, the remark was a dictum.

⁸ The Act of 1853 was only intended to apply to citizens of Pennsylvania, and a trust intended to take effect beyond the bounds of the State of Pennsylvania cannot be affected by it: *Fowler's App.*, 125 Pa. 388 (1889).

⁹ There was probably such a contingent gift in *Howell's Est.*, 5 W.N.C. 430 (1878), although the point was not raised; see *Gray, Rule Perp.*, 2 ed. (1906), §718, n. 2; see also *Mellon's Est.*, 16 Phila. 323 (1884).

invalidity of such a direction is, however, the logical consequence of the construction of the act adopted by the Supreme Court.

Where the Minor is Born After Testator's Death—Successive Minorities

641. The Supreme Court of Pennsylvania has not had occasion to consider how far an accumulation can be directed of the income of a minor born after the testator's death, or for a succession of minorities, in each of which cases, if the direction were valid, there would be a period of accumulation during the minority or minorities falling beyond the twenty-one year period. There are dicta that the act applies,¹⁰ but it is submitted that the act does not apply.¹ The accumulation taking place after that part of the minority or subsequent minorities falling beyond the period of twenty-one years marked out by the act, is an accumulation taking place under the policy of the law.²

Time of Going Into Effect

642. The act applies to the will of a person dying after the 18th day of April, 1853, even though the will is dated before that time,³ and although the act contains no provision

¹⁰ Penrose, J., in *Furness Minors' Est.*, 14 W. N. C. 391 (1884), said: "It is far from clear that the Act contemplated an accumulation through a succession of minorities; certainly a trust for this purpose which might last, as in the case of the youngest of the present minors, for more than twenty-one years after the expiration of a life or lives in being at the death of the testator, would transgress not only the Act of Assembly, but would be void as creating a perpetuity." It to be is observed, however, that the learned judge gave no reason for his doubts, that the point was not before him for decision, and that his attention does not seem to have been called to the principle of law which permits the accumulation of the income of a minor in any event, whether so directed or not. See also Penrose, J., in the court below in *McBride's Est.*, 152 Pa. 192 at 196 (1893).

¹ See *In re Cattell*, (1907) 1 Ch. Div. 567 where it was decided under the fourth clause of the English act that the minor need not be born at the date of the testator's death. "But wherever a testator has directed an accumulation which will only commence in the event of the beneficial owner being a minor, and which will be limited by and engross only such income as would have been otherwise accumulated by force of law during such minority, the trust for accumulation seems to be founded on a different principle unproductive of mischief, within the express words of this clause, and not impeachable from any reported case." Hargrave on the *Thellusson Act*, 131, 132 (1842).

² See §615, ante.

³ The act provides: "This (section) shall take effect and be in force as well in respect to wills heretofore made by per-

on the point, it is apprehended that all deeds dated after the 18th day of April, 1853, are in like manner, subject to its provisions.

As to Computation of Twenty-one Years

643. The twenty-one years begins to run from the testator's death, and in the computation of the term the day of his death is to be excluded.⁴ In the case of a deed the period would begin to run from the day of the date thereof, and in the computation the day of the date would be excluded.

The Act Does Not Render the Direction to Accumulate Void in Tolo

644. The statute provides that a direction to accumulate shall be null and void in so far as it shall exceed the limits of the act. It is the effect of the proviso that a direction to accumulate which is partly within and partly without the statute is valid as to the part within.⁵ This clause is omitted from the English statute, but the same result has been reached in England by construction.⁶ A distinction must be taken in applying this proviso. Where there is a contingent gift of the accumulated fund, the proviso cannot apply, because the gift depends on the direction to accumulate, and as that direction fails, the whole gift is void, and there is no one entitled to any part of the accumulations.⁷ Where there is a vested gift

sons yet living and of competent mind, as in respect to wills hereafter to be made." *Holloway's Est.*, 11 Pa. C. C. 90 (1892). There is a misprint in the opinion in this case of 1855 for 1853. See also *Huber's App.*, 80 Pa. 348 (1876), stated §672, post.

⁴ No Pennsylvania case has been found on this point; see *Gorst v. Lowndes*, 11 Simon. 434, (1841), 10 L. J. Ch. 161.

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §716; dictum, *Strong, J.*, in *Brown v. Williamson*, 36 Pa. 338 at 341 (1860); *Gordon, J.*, in *McKee's App.*, 96 Pa. 277 at 285 (1880); dictum, *Clark, J.*, in *Conrow's App.*, 3 Penny. 356 at 366 (1883); dictum, *Penrose, J.*, in the court below, in *Lennig's Est.*, 154 Pa. 209 at 213 (1893).

⁶ A rule of construction entirely novel

in the decision of questions as to remoteness: *Lewis, Perp.*, p. 593 (1843); see remarks by *Gibson, C. J.*, in *Hillyard v. Miller*, 10 Pa. 326 at 335 (1849). The difference between the two statutes was probably overlooked by *Strong, J.*, in *Brown v. Williamson*, 36 Pa. 338 at 341 (1860), where he said, "The trust indeed may be transgressive, but even under the *Ripon Act*, 39 and 40, Geo. III., ch. 98, in England, the excess only beyond the period allowed for trusts of accumulation is void. They are sustained for the statutory period. Our Act of 1853 was modeled after the *Ripon Act*, and it avoids only the excess in transgressive trusts."

⁷ Gray, *Rule Perp.*, 2 ed. (1906), §§671-674; *Hillyard v. Miller*, 10 Pa. 326 (1849).

of the income and a subsidiary direction to accumulate for a period longer than that prescribed by the statute, the proviso applies and the accumulation can be stopped when the lawful period has expired.⁸

Proviso as to Minority

645. The proviso authorizes the court in certain cases, on the application of the guardian, to make an order for an adequate allowance to the minor out of the income directed to be accumulated.⁹ The construction of the act adopted in Washington's Estate¹⁰ renders this clause of the act superfluous, as income can be accumulated only for the benefit of and out of the income of a minor, and the court has power¹ anyhow in such a case to decree an allowance out of the income.²

Direction to Accumulate for the Payment of Debts

646. A direction to pay off legacies, charges, debts or encumbrances out of income necessarily involves an accumulation.³ A provision for the payment of debts is especially exempt from the operation of the English statute. There is no such provision in the Pennsylvania act,⁴ and such a direction to accumulate is probably void in Pennsylvania,⁵ although the

⁸ *Butler v. Butler*, 9 Phila. 269 (1875), Supreme Court at *Nisi Prius*. There was a direction to accumulate the income until a son should attain the age of twenty-eight years, and it was held that he was entitled to have the accumulations stopped and receive the income upon arriving at the age of twenty-one years; see also ninth clause of the will in *Brooks's Est.*, as reported in 8 Pa. C. 514 (1890), and remarks of Penrose, J., at p. 518; see also *Young's Est.*, 16 D. R. 541 (1907).

⁹ See §623, ante, for the provisions of the act.

¹⁰ 75 Pa. 102 (1874), stated, §632, ante.

¹ *Lightner v. Lightner*, 127 Pa. 468 (1889); Act of March 26, 1832, §13 P. L. 193.

² An allowance was decreed the guardian of a minor in the following cases: *Washington's Est.*, 75 Pa. 102 (1874), s. c. 8 Phila. 182 (1871); *Furness Minors' Est.*, 14 W. N. C. 391 (1884). The remarks of

Dwight, J., in *Stille's App.*, 4 W. N. C. 42 (1875), were dicta, as the beneficiary was of age and there was no application by a guardian.

³ See demonstration by Penrose, J., in *Lutz's Est.*, 27 W. N. C. 403 at 406 (1890), s. c. 20 Phila. 89, 9 Pa. C. C. 294.

⁴ This omission commented on by Paxson, J., in *Washington's Est.*, 8 Phila. 182 at 189 (1871); quoted by Trunkay, J., in *Carson's App.*, 99 Pa. 325 at 329 (1882); see remarks of Penrose, J., in *Lutz's Est.*, 27 W. N. C. 403 at 406 (1890).

⁵ A direction to use income to pay off encumbrances held void in *Lutz's Est.*, 18 Phila. 114 (1886); see also remarks of Penrose, J., in *Rhodes' Est.*, 147 Pa. 227 at 231 (1892). There was a similar direction in *Joyce's Est.*, 5 Pa. C. C. 179 (1888), and in *Brewster's App.*, 7 *Sadler's Cases*, 604 (1888); 45 L. I. (1884); 35 *Pitts. L. J.* 449; 12 *Atlan.* 470.

question has not been passed on by the Supreme Court.⁶ The distinction between this case and the case of a gift of an accumulated sum which is valid, lies in this: in the former case the creditor has anyhow a charge against principal, and the gift out of income operates to relieve the principal of that charge, and, to that extent, increases the capital by the use of income, whereas, in the latter case, the recipient of the accumulated sum has no claim against the principal, and its validity or invalidity cannot affect the amount of the capital of the estate.⁷

Direction to Improve Real Estate

647. A direction to trustees to use the income to improve or alter real estate, may involve an accumulation in so far as the income expended under the direction is used for more than ordinary maintenance and repairs. Such a direction does not seem to be within the English act.⁸ The question has never been decided in Pennsylvania, although cases sometimes occur in the lower courts where trustees are permitted to spend large portions of the income in what might be termed capital improvements.⁹ In *Eberly's Appeal*¹⁰ the court gave as one of the reasons for permitting the trustee to retain the income that it might be necessary to rebuild some of the improvements if destroyed by fire. There is a dictum of Penrose, J.,¹ that a direction to apply surplus income to the alteration and improvement of a trust estate unquestionably transgresses the provisions of the statute against accumulations. In this condition of the cases, therefore, it is impossible to state what the law is, and the question will have to remain open until passed on by the Supreme Court. It is apprehended, however, that the direction is void in Pennsylvania. It will often be extremely difficult in practice to draw the line between expenditures for maintenance and expenditures for improvement.

Application of the Act to Directions to Accumulate Under a Deed

648. In all cases heretofore discussed, the direction to ac-

⁶ In *Johnston's Est.*, 185 Pa. 179 (1898), the directions had been carried out and the question was not raised.

⁷ To be distinguished from a direction to pay encumbrances out of principal, for a case of which see *Barker's Est.*, 159 Pa. 518 (1894).

⁸ Gray, *Rule Perp.*, 2 ed. (1906), §699b, and authorities cited.

⁹ See *Rankin's Est.*, 19 Phila. 54 (1888); *Joyce's Est.*, 5 Pa. C. C. 179 (1888).

¹⁰ 110 Pa. 95 (1885), stated §663, post.

¹ *Mitcheson's Est.*, 5 Pa. C. C. 99 at 104 (1888).

cumulate has been contained in a will, and the period marked out by the life of the settlor is not available. When the settlement is by deed inter vivos, the law is different, and the total period of accumulation is the life of the settlor plus twenty-one years after his death. The accumulation, therefore, will extend over a greater period than the minority of a minor, and it, therefore, seems that the Supreme Court will have to recede from the position taken in Washington's Estate,² that the accumulation can be directed only of the income of a minor and that the accumulations must be paid to him on reaching twenty-one. The question has not yet presented itself for decision, and when it does arise, it will be of no small difficulty.³

² 75 Pa. 102 (1874), stated §632, ante; see §639, ante, for summary of the law.

³ There was a direction to accumulate by deed inter vivos in the case of Carson's App., 99 Pa. 325 (1882), s. c. Carson v. Rutter, 12 W. N. C. 161, which turned on a question of construction arising on a bill in equity to reform the deed. In that case Matthew Baird, by deed dated 1866, transferred certain securities in trust to apply the income to the maintenance of his three minor daughters until they attained the age of twenty-one years or married, and so much of the income as should not be necessary for that purpose, to invest and accumulate; and, upon the marriage of the daughters or their arrival at the age of twenty-one, to pay the income thereafter accruing, together with the accumulations of income which might have been invested, to the said daughters as therein provided. The testator maintained the daughters himself, so that nearly the whole income of the estate accumulated in the hands of the trustees. After his death in 1877 one daughter, who had arrived at the age of twenty-one years, filed a bill in equity praying for a decree directing the trustees to pay to her her share of the accumulations. The trustees filed a plea, averring that it was the intention of Matthew

that the accumulated income should be added to the capital on the daughter's arriving at twenty-one. The court below directed the payment of the accumulated income to the daughter as prayed for. On appeal the Supreme Court affirmed. No other point seems to be involved in the case. The trust deed provided what should be done with the accumulations and the averment by the trustees that the intention was otherwise was not allowed to prevail against the deed. Penrose, J., in Grim's Est., 12 W. N. C. 354 at 356 (1880), said that this case followed the decision in Washington's Est., which was never regarded with favor, solely on the ground of *stare decisis*. The learned judge did not point out that the remarks of the court were dicta, the deed not having been reformed, as prayed for. Ashman, J., in the court below in Howell's Est., 180 Pa. 515 at 516 and 517 (1897), said that there existed in this case the evil of capitalization of income, which the statute sought to avoid. As the direction to accumulate was plainly valid and so held, the propriety of the citation is open to doubt; cited by Rhone, P. J., in Sharp's Est., 155 Pa. 289 at 294 (1893), as authority for the proposition that a direction to accumulate during the life of R. and the life of his widow, is void in toto.

Clause Against Involuntary Alienation—Spendthrift Trusts

649. The clause against alienation, voluntary or involuntary, obviously can have no effect on the validity of a direction to accumulate.⁴ Where there is a direction to accumulate, the cestui que trust, in the absence of anything to the contrary, can freely alienate his right, such as it is, and it can be taken in execution for the payment of his debts. The question, however, has not been decided.⁵

Preliminary Discussion of Accumulations For the Members of a Class

650. There is a nice question in this connection which does not seem to have attracted any attention. Suppose there is a direction to accumulate the income of the members of a class during their minority. They will not all, except in the unusual case of twins, triplets, etc., reach twenty-one at the same time. Two cases may arise: first, where there is a direct vested gift to the members of a class, and, second, where there is a contingent gift to the members of a class.⁶

Accumulations for Members of a Class Where the Gift is Vested

651. Suppose there is a vested gift to the members of a class which closes in time,⁷ with a superadded direction to accumulate the income until the time of distribution. If an elder member of the class reaches twenty-one, say two years after the testator's death, he is entitled to have the accumulations of his share of the income paid to him, and to thereafter receive his share as it accrues. The class may be subsequently increased by the accession of a new member. So much of the accumulation during the minority of the new member as falls beyond the twenty-one year period, will take

⁴ See §626, ante.

⁵ In *Eberly's App.*, 110 Pa. 95 at 97 (1885), the court did not find it necessary to decide the question although it had been argued by counsel. The cases cited in §678, post, containing dicta in favor of allowing an accumulation under an express discretion, in some of which there was a clause against involuntary alienation, may lend support to the view

that a direction to accumulate where there is a clause against alienation would be an exception to the statute.

⁶ For a discussion of the distinction between the two, and of the principles relating to the closing of the class, see §§440-444, ante.

⁷ For the principles relating to the application of the rule against perpetuities, see §§445-447, ante.

place under the policy of the law.⁸ The share in the principal and income of the one who has reached twenty-one will be proportionately diminished. The new member is not entitled to income until he is born, and consequently is not entitled to any of the income which has been previously paid over. The trustee must make a new division of the income to correspond to the different number of shares, and he may retain and accumulate the income of the new member until he also reaches twenty-one.⁹

Accumulations Where Gift is Contingent

652. Suppose, however, there is a contingent gift of the residue for a class of minors, with a direction to accumulate the income. In *Mellon's Estate*,¹⁰ where there was a direction to accumulate for the members of a class who probably took contingent interests, Penrose, J., in the court below,¹ said: "but while they (that is, the shares of the residuary estate), were held by the trustee, the accumulation of income accruing after they (the sons) successively attained their majority, but before the time for absolute vesting, was transgressive of the Act of 1853, and the question arises, who are entitled to such illegal accumulations?" The income was distributed under the intestate law. The report is not clear as to whether the accumulation was of income accruing during the whole period or of income accruing between the time when one member reached twenty-one and the period of vesting. The language of the learned judge leads to the inference that it was the latter. Where the gift is contingent the elder member of the class is not entitled to any income until the time of vesting, and the circumstance of his reaching twenty-one prior to that time, would not give him any greater right. It is difficult, therefore, to see how the accumulations can be distributed before the time of vesting. The survivor of the members of the class who might become entitled to the whole fund may have reached twenty-one before the testator's death; he would then be entitled to all the ac-

⁸ See §641, ante.

⁹ Such circumstances were present in *McBride's Est.*, 152 Pa. 192 (1893); as, however, that case did not come before the court until the youngest member of the class had reached twenty-one, the point did not arise.

¹⁰ 16 Phila. 323 (1884), in the Supreme Court sub-nom., *Gowen's App.*, 106 Pa. 288 (1884). Some of the material facts of this case do not appear in the opinion of the auditing judge, and have to be picked out from the Supreme Court report.

¹ 16 Phila. at 324.

cumulations if the direction were valid, and there would ensue a plain violation of the statute. It is apprehended that in this case there is no way to separate the gifts, and that, therefore, the entire direction to accumulate is void.²

General Discussion of the Proviso as to Charities

653. The act excepts from its operation "any donation, bequest or devise for any literary, scientific, charitable or religious purpose."³ Thus, a direction to pay annuities out of the income on a residue, and accumulate the balance thereof and pay the accumulations, with the residue, to a charity at the death of the annuitant, is valid,⁴ so also a direction to accumulate a sum for a monument,⁵ or to accumulate a certain sum to establish a house of refuge.⁶ A contingent gift is not within the proviso, as a charity must be the sole and exclusive purpose of the accumulation;⁷ but the fact that non-charitable beneficiaries participate in the income on the accumulations until the time of distribution is immaterial.⁸ The same question of construction will arise in the case of a gift to a charity as in the other cases, that is, whether the direction is to pay the accumulated fund on a contingency or whether there is a direction to accumulate the income of a vested interest.⁹ Since a charitable trust may be and gener-

² Confer, *Martin's Est.*, 185 Pa. 51 (1898).

³ See §623, ante.

⁴ *Biddle's App.*, 99 Pa. 525 (1882), reversing *Derbyshire's Est.*, 11 W. N. C. 22 (1881). The court below decided that a fund should be set aside to pay the annuities and the balance distributed immediately to the charity. The Supreme Court reversed on the question of construction, and directed the whole estate to be kept together and the income accumulated until the death of the annuitant.

⁵ In *Reimer's Est.*, 159 Pa. 212 (1893), there was a direction to accumulate to build a monument, as to which no question was raised. As a gift for a monument is a valid charitable use, under the Act of May 26, 1891, P. L. 119, see §§787, 788, post, there seems to be no objection to the direction to accumulate.

⁶ *Stevens's Est.*, 164 Pa. 209 (1894).

⁷ *DeRenne's Est.*, 12 W. N. C. 94 (1882), *semble*; dictum, *Penrose, J.*, in *McBride's Est.*, 152 Pa. 192 at 196 (1893); in this case the contingency on which the gift was to take effect did not happen.

⁸ *Lennig's Est.*, 154 Pa. 209 (1893).

⁹ For a case involving such a question of construction, see *Biddle's App.*, 99 Pa. 525 (1882), s. c. 12 W. N. C. 231, reversing *Derbyshire's Est.*, 11 W. N. C. 22 (1881). In *Franklin's Est.*, 150 Pa. 437 (1892), the personal representatives of the decedent sought to enforce a resulting trust in their favor arising from an alleged void direction to accumulate contained in the will of Benjamin Franklin. It was decided in the court below, 27 W. N. C. 545 (1891), that the personal representatives could not recover, *Penrose, J.*, placing the decision on the ground that there was a vested gift for a charitable purpose, with a superadded direction to accumulate, in

ally is of indefinite duration and the interest is generally vested absolutely in the charity, most cases of direction to accumulate will be of the latter class.

Contingent Gift of an Accumulated Fund to a Charity

654. If there was a contingent gift of the accumulated fund to a charity which violated the rule against perpetuities, it was void before the act,¹⁰ and is still void notwithstanding the proviso.¹ Where there is a direction to accumulate a certain sum, the court will take judicial notice of the fact that the income is sufficient to produce the required sum within the period prescribed by the rule against perpetuities.²

Young v. The Church

655. In *Young v. The Church*³ the testator gave certain bonds in trust to pay certain annuities out of the interest, some of them for charities, with direction to invest the surplus income, if any, for the benefit of the trust, with the further proviso that if the income should be insufficient to pay all of the annuities, they should be reduced proportion-

which case the next of kin had no standing to the income, even if the direction were void. This was affirmed by the Supreme Court on appeal, although the decision was placed on other grounds. The next of kin then brought a bill in the Common Pleas, *The Apprentices' Fund Case*, 13 Pa. C. C. 241 (1893), to enforce the resulting trust, and the court in an opinion by Arnold, J., dismissed the bill. It is not clear from his opinion whether he considered the gift vested or contingent.

¹⁰ In *Hillyard v. Miller*, 10 Pa. 326 (1849), there was a direction to loan out the income to deserving young farmers and if it so happened that the income should accumulate beyond the applications for loans, then to apply the same toward building an asylum. It was held that the direction to accumulate was void; that the first gift was not a charity, and the expenditure of income for that purpose was therefore void, and that the second gift failed because it violated the rule against perpetuities and there was

therefore a resulting trust.

¹ *Rogers's Est.*, 18 Phila. 99 (1886). The true bearing of the proviso, it is submitted, was overlooked by Stewart, J., in the court below, in *Young v. The Church*, 200 Pa. 332 at 334 (1901), stated §655, post, where he said, "Were it not for the Act of May 9, 1889, P. L. 173, and the first proviso of the Act of April 15, 1853, P. L. 503, §9, I should unhesitatingly say that the trust created (in the case at bar) violated both the rule against perpetuities and the statute against accumulations. But this act and this proviso stand in the way."

² *Penrose, J.*, in *Lennig's Est.*, 154 Pa. 209 at 215 (1893). In *Curran's App.*, 4 Penny. 331 (1884) s. c. 15 Phila. 84, it would have required a period longer than that prescribed by the rule against perpetuities to have accumulated the sum specified. No notice was taken of this point, and the case was decided on other grounds.

³ 200 Pa. 332 (1901).

ately, the bonds or proceeds thereof to be eventually used for such purpose as might thereafter be directed. The testator died without making any such direction. In a case stated in the Common Pleas, in which the next of kin were plaintiffs and one of the charity annuitants was a defendant, the court below entered judgment for the defendant, which, on appeal, was affirmed by the Supreme Court without an opinion. The gift to the charity was plainly valid. The remarks of the learned judge, Stewart, J., in the court below, on the question of accumulations, were clearly dicta, as no question as to that part of the will was properly before the court until those entitled applied for an order on the trustee to pay over the accumulated income. If the next of kin or residuary devisees in this case had applied to the court to have the surplus income paid to them, as well as a resulting trust decreed of the bonds after the expiration of the annuities to the individuals, there seems to be no reason why they should not have succeeded.

Vested Gift to a Charity

656. Where there is a vested gift to a charity, and a direction to accumulate the income engrafted thereon, it is not altogether clear whether the direction to accumulate is void.⁴ No Pennsylvania case has been found deciding the question.⁵ A similar direction in the case of a gift vested in an individual is probably void.⁶ There is, it is apprehended, no reason for any distinction in the case of a charity. It seems, however, that no one but the charity can take advantage of the invalidity of the direction to accumulate.⁷

⁴ Mr. Gray, *Rule Perp.*, 2 ed. (1906), §679, seems to think that the direction is valid and he cites *Biddle's App.*, 99 Pa. 525 (1882), as an authority for this position. That case, it is submitted, turned on a question of construction, and decided that the testator intended a gift of the accumulated fund at a future period, and does not, therefore, raise the point. See §653, n. 4, n. 9, ante.

⁵ There is a dictum by Lowrie, J., in *Phila. v. Girard*, 45 Pa. 9 at 27 (1863), that the direction would be void; see also *Curran's App.*, 4 Penn. 331 (1884), s. c. 15 Phila. 84, and *Franklin's Est.*, 27 W. N. C. 545 (1891), *sensu*; *Penrose, J.*,

in the latter case, at 548, quoting from *Gray, Rule Perp.*, 1 ed. (1886), §678, said that if the direction to accumulate is too remote, etc. In the 2nd edition, (1906), the learned author has changed this language to "if the direction to accumulate is invalid," which is more accurate, as the direction to accumulate cannot possibly violate the rule against perpetuities if the gift to which it is attached is vested, and is invalid, if at all, as a restraint on enjoyment.

⁶ See §621, ante.

⁷ *Gray, Rule Perp.*, 2 ed. (1906), §678; see §696, post.

Act Limiting Amount to be Held by Charitable Corporation

657. The total amount of property which a religious, charitable, scientific, literary or beneficial association may hold, is specifically limited by certain legislative provisions.⁸ In the absence of any evidence to the contrary, the presumption probably is, that the gift in question would not increase the holdings of the charity beyond the amount limited by law. And if there is a gift to such a corporation of an excessive amount, or an amount which, combined with that which the charity already has, would exceed the amount prescribed, the gift is valid, but the excess is to be disposed of under the Act of April 26, 1855,⁹ and the heir at law or next of kin have no claim to the excess in any event. This legislation has nothing to do

⁸ Act of April 26, 1855, §§8 and 12, P. L. 328. The provisions of the act are as follows: §12. "That to avert the evil of an indefinite increase of the property in mortmain and perpetuity, it shall not be lawful for any religious, charitable, literary or scientific society, association or corporation, present or future, to accumulate income into capital or invested estate, so as that the clear annual value thereof, as regards future acquisitions with those now held, shall exceed the limitation hereinbefore contained, and as regards acquisitions now held by or for any such body, shall not exceed said annual amount, except as the property now held does or being made more productive may exceed such amount, but all such clear income, after such amount of capital or invested estate shall be attained, shall be expended annually in and for the purposes, uses and trusts upon and for which the property producing it is held; and if there be not objects within the intent of such purposes, uses and trusts sufficient to exhaust such income, it shall be the duty of such body or association holding such property to apply to the legislature for authority to expend the income thereof upon such practicable objects as shall most nearly conform to the intent of the uses and trust upon which such property is held, and in default thereof, such income as

shall not be so expended in execution of its trust, shall be paid into the treasury of the commonwealth: Provided, That this section shall not be taken as intended to apply to any corporation or trust, if any there be, placed by contract beyond such legislative requisition." §8 provides that the clear annual value shall not exceed \$5,000. By the Act of April 22, 1889, §1, P. L. 42, any literary, religious, charitable or beneficial society, congregation or corporation may hold property to the clear annual value of \$30,000, and by the Act of June 6, 1893, §1, P. L. 324, any religious, educational, literary, scientific or charitable corporation may obtain the consent of the Court of Common Pleas to an increase in the amount of their holdings. The act of 1855 is limited in its scope and seems to be directed towards prohibiting the associations mentioned from increasing the corpus of their estates by accumulating the income thereof. No case on the point has been found, and the act is probably of rare application, as most charitable organizations use up each year's income in the purpose of the charity, and commonly find it necessary to call on their friends to make up a deficit.

⁹ §10, P. L. 328. See Curran's App., 4 Penny. 331 (1884), s. c. 15 Phila. 84, semble.

with the directions to accumulate income which we are discussing, but it seems proper to refer to it in order to clearly point out its non-application to the subject in hand.

Accumulations in the Interest of Judicious Management

658. The doctrine under which an accumulation in the interest of judicious management is permitted, is to be confined to very narrow limits. The trustee must pay the charges on the trust, and he is not required to make advances out of his own pocket for such purpose. For reasons, therefore, of business convenience, he may consider each year's income as a whole, and retain such part thereof as may reasonably be expected to be necessary to meet impending charges. Any payment to the cestui que trust during the year is a payment on account, and no income can really be said to be due until an account for the year has been stated, and the balance actually due has been ascertained.¹ If, at the end of the year, the trustee requires money for the next year, he may retain a balance for that purpose.² The limits of this doctrine may be stated thus: he may retain income to meet impending regular charges against the trust but not to fulfill his ideas of what is to the interest of the cestui que trust, and any direction in the settlement of the trust requiring him to make any special accumulation will be void. So also, and it is conceived for like reasons, the income may be accumulated for the first year after the testator's death.³

¹ The time of payment, whether yearly, quarterly, or monthly, may be regulated by the provisions of the trust. Where there is no such provision the usual custom is to pay quarterly, or as arranged between the trustee and the cestui que trust. Such direction, however, involves an accumulation pro tanto. For the case of a direction to pay the income annually, see Penrose's App., 102 Pa. 448 (1883). The validity of these directions has never been questioned in Pennsylvania, and it is not likely that any direction for the term of one year or less would be disturbed. See remarks of the auditor in the court below in Hibbs' Est., 143 Pa. 217 at 220 (1891); see this case stated §664, post.

² This is the true explanation of Mitcheson's Est., 5 Pa. C. C. 99 (1888); same will as was before the court in 11 W. N. C. 547 (1882); Penrose, J., at 104, 105, said that the trustees could retain the surplus of \$549.46, as that amount was necessary to carry out the legitimate purposes of the trust. It appears that the accountants claimed the balance for the expenses incident to the trust for the ensuing year. The remarks in the case were dicta, as no one entitled to the accumulations appeared before the court.

³ In Williamson's Est., 143 Pa. 150 (1891), the testator directed his executors, who were different from his trustees, to hand over the residue of his estate to his trustees, in trust, to accumulate the in-

Preliminary Discussion of the Misunderstanding of the Doctrine of Accumulations in the Interest of Judicious Management

661. The doctrine under which the trustee may accumulate income in the interest of judicious management⁴ has, it is apprehended, been misunderstood by the court and been carried beyond all proper bounds. The cases are as follows.

McKee's Appeal

662. The first trace of this misunderstanding is to be found in McKee's Appeal.⁵ On the point of the accumulations, the court said, Gordon, J.,⁶ "But since his (testator's) death, there have been large accumulations arising from rents, issues and profits, accumulations which exceed the original estate and the necessities of the trust, and the serious question is, what disposition shall be made of them?" That is all there is in the case as to the doctrine. As the accumulations were all distributed, the remark as to the necessities of the trust was a dictum.⁷

come for ten years thereafter, and then to dispose thereof as therein provided, a direction admitted to be void. Upon the filing of the executors' account one year after his death, the balance of the income for the year in the hands of his executors was claimed by the trustees. The court below made an elaborate argument to show the distinction between principal and income, and that the income could not fall into the residuary estate, because if it did there would be an accumulation for one year, which was void, and therefore the income accumulated during the year should be paid to the next of kin. On appeal, the Supreme Court reversed and in an opinion by Mr. Justice Green, after considering all the provisions of the will, concluded with the remark, at p. 166: "That trustee never did and never could accumulate that portion of the income which accrued during the first year, and hence the statute of 1853 has not been, and cannot be transgressed, so far as that year's income is concerned." That point, however, was not before the court; the

trustee had not attempted to accumulate income; it was simply asking to have the income accumulated during the first year awarded to it as directed by the testator. Mr. Gray, *Rule Perp.*, 2 ed. (1906), §676a, calls attention to the cases arising in England of a direction that personal property and its accumulated income shall be invested in land or that land and the accumulated rents shall be sold and the proceeds invested in personalty; and says that in such case the courts allow the accumulation for one year. He further says, "Whether this rule be one of construction or convenience so-called, may be doubtful, but it is well settled and prevents such provisions raising any question of remoteness." Such trusts are not of frequent occurrence in Pennsylvania. The law is probably the same.

⁴ Discussed §658, ante.

⁵ 96 Pa. 277 (1880).

⁶ At p. 284.

⁷ This case deals with the question of the distribution of the accumulations. See §686, post.

Eberly's Appeal

663. In *Eberly's Appeal*⁸ the testator gave the residue of his estate in trust to pay an annuity, provide for the education of his son during minority, and, upon the son's reaching majority, to pay him \$500, and a like sum annually until the son was twenty-five years old, when the corpus should be paid to him if the trustee saw fit or if, upon proof and order of the Orphans' Court of Cumberland County, it should appear that he was a sober and well-doing man. If it should not be paid to the son, it was to continue to be held in trust, and the income of \$500 per annum paid him for life, and at his death the principal to his heirs. The son, on reaching twenty-three, applied to have the accumulations, which it appeared were in the hands of the trustee, paid to him. There seemed to be evidence that the son was not a fit person to take charge of the estate. It also appeared that the accumulations had been attached by various creditors of the son, and that the annuitant was dead. The court in an opinion by Sterrett, J., said that the accumulation of \$5,000 in the hands of the trustee was reasonable and necessary to the proper administration of the trust in order to keep up the annuity, entirely overlooking the fact that the annuitant was dead. The learned judge was also influenced by the consideration that the subject matter was real estate, as he said that the accumulated income might be necessary to provide for a failure of crops or the destruction of the farm buildings by fire. How the use of the income for the latter purpose could be anything but an accumulation, it is difficult to see. The accumulation was of the income of a residue, and payable to the next of kin or heir at law. It appeared that the son was the only issue of the deceased, and would, therefore, be entitled to the accumulations as heir at law. It is not clear how the son claimed and it is, therefore, difficult to determine the exact value of the case as a precedent.

Hibbs' Estate

664. In *Hibbs' Estate*⁹ the auditor in the court below found as a fact that it was not necessary to keep any sum on hand for the purposes of the trust, the subject matter being

⁸ 110 Pa. 95 (1885).

⁹ 143 Pa. 217 (1891). See this case stated §674, post.

investments in mortgages and judgment liens, and decided that the accumulations of income amounting to \$5,000 should be paid to the son. On appeal, the Supreme Court reversed the decree of the Orphans' Court affirming the auditor's report,¹⁰ Sterrett, J., saying that where there were two classes of accumulations, one where the manifest purpose of the testator was to add the accumulations permanently to the estate, which was void, and the other where the accumulations were intended to be temporary and in the interest of judicious management, which was valid; that the record did not show that the amount set apart, \$5,000, was unreasonable; and that as the accumulation was temporary, and in the interest of judicious management, it was valid. The court ignored the fact found in the court below, that there was no necessity for the contingent fund, and that the will directed the income to be invested for the benefit of the son, and made no reference whatever to the purpose of judicious management. The action of the court in reversing the question of fact found by the auditor, in the absence of clear error, is open to serious objection.¹¹

McIntosh's Estate

665. In McIntosh's Estate¹ the testator gave one-half of the rents of certain real estate in trust for A., "and if he continue sober and industrious, the rents shall be given him as before, but if he be not sober and industrious, said rents shall not be given to him but shall remain and accumulate in the hands of the above-named trustees." There was no disposition of the accumulations, except incidentally as implied in the disposition of the principal. The court below² said, "The accumulations, if any, will be simply temporary and in the interest of judicious management. Hibbs' Estate, 143 Pa. 217." The question was not argued, and from the rather obscure report of the case it does not appear what exceptions

¹⁰ The report of the auditor on p. 220 is a very clear statement of the correct principle of law.

¹¹ Contrast language of Gordon, J., in *Schwartz's App.*, 119 Pa. 337 at 349 (1888): "The principle on which the court based its order is undoubtedly sound, and whilst it is true that these accumulations might have been allowed to re-

main in the hands of the executor as a contingent fund, yet as it does not follow that any fund was needed for the use of the estate, we must concede something to the sound discretion of the court below."

¹ 158 Pa. 528 (1893).

² On p. 537.

were carried to the Supreme Court. It further appears from the statement by the auditing judge³ of the questions involved, that no question as to the accumulation was before the court.

Howell's Estate

666. In *Howell's Estate*⁴ the annuitant was dead, and it appeared that there was income in the hands of the trustees arising out of the fund which had been set apart for the annuity under the terms of the will, and that the sole question before the court was as to the distribution of this sum. Any discussion, therefore, as to the propriety of the accumulations was out of place, being an opinion on what the court would have done had an application been made in the lifetime of the widow to have the accumulations stopped.⁵

King's Estate

667. In *King's Estate*⁶ the testator gave one-third part of the residue of his estate in trust for his son Alexander for life, the income to be paid him without liability for debts, and upon the son's death the principal to go to his children, the son to receive an income not exceeding \$5,000 per annum, and any excess of that amount to be invested for the benefit and increase of the respective shares in the principal. By a codicil, the testator revoked the bequest to the son, and gave that interest to the wife and children of the son during the life of the son, in payments not to exceed \$5,000 per annum. An account being filed, it appeared that there were accumulations of income over and above the amount directed to be paid by the will. On the question of accumulations the court below, Hawkins, P. J., said, in an opinion⁷ which was affirmed on appeal by the Supreme Court, "The accumulations in this case are so largely in excess of the allowance fixed in the

³ On p. 532.

⁴ 180 Pa. 515 (1897).

⁵ Where there is a specific sum set apart to meet an annuity, the question as to the amount necessary is to be determined in the discretion of the court, and the residuary legatees have no standing to complain if the amount may produce more than the income specified: *Mullen's Est.*, 16 Phila. 306 (1883), s. c. 14

W. N. C. 144, 40 L. I. 466. In such case, however, if at the end of any year there is an excess of income over the amount necessary to meet the annuity, there seems to be no reason why the residuary legatees should not be entitled to receive the excess.

⁶ 210 Pa. 435 (1904).

⁷ At p. 439.

will, and the contingent fund proper to judicious management of the trust, that they fall within the prohibition of the statute. In view of the character of this estate, \$10,000 would for the present provide an ample contingent fund. And as the balance of the accumulations was intended for the benefit of the children, distribution should be made to them. There is nothing on the face of this will to justify the additional suggestion made at the argument of the exceptions that the primary purpose in the creation of the trust was accumulation. The natural and obvious purpose was the protection of the testator's son and his family from his improvidence, and the provision for accumulation was simply incidental. But even concede that accumulation was part of the scheme, it does not follow that that relating to the maintenance of the family must fail. It is the policy of the law to carry out the testamentary intention so far as it is possible; *Forney's Estate*, 161 Pa. 209; and the validity of the trust to this extent is clear and should therefore be carried out." This case goes a long way. The question does not seem to have received much attention or argument.

Discussion of the So-called Doctrine of Accumulation in the Interest of Judicious Management

668. Various reasons have been advanced in support of the propriety of allowing accumulations in the interest of judicious management. These reasons will now be examined. One reason assigned is that such accumulations are temporary and not within the statute, as they do not inevitably tend to capitalization and are not so intended; that the purpose of the statute is to prevent permanent accumulations, and not to interfere with judicious management.⁸ The evil aimed at, however, by the statute, is just what might happen in this case. Suppose the cestui que trust should die or the trust terminate, leaving the trustee with an accumulated income on hand. The trustee could not retain that accumulation; he must pay it to some one, and as to that person, whoever might be decided to be entitled, there would be an accumulation which would be in violation of the statute. This seems too plain for argument.

⁸ Traces of this reason are to be found in *Hibbs' Est.*, 143 Pa. 217, *Sterrett, J.*, at 225 (1891); *Howell's Est.*, 180 Pa. 515, *Fell, J.*, at 520 (1891); *Lafferty's Est.*, 20 Pa. C. C. 632, *Ashman, J.*, at 633 (1898).

The reason given, therefore, amounts to this: the case in hand does not necessarily produce the evil aimed at by the statute, that is, it may or may not be within its terms; therefore, it is an exception. Yet, in *Eberly's Appeal*,⁹ the court said that one of the reasons why they permitted the accumulation was that the income might be necessary for rebuilding the trust property if destroyed by fire,¹⁰ a use which would be just as much a capitalization of the accumulation as if it were added to the principal and distributed as such. It may be doubted, therefore, if this reason is sufficient to justify the court in reaching a conclusion in the teeth of an act of legislature. Another reason given in some of the cases¹ is that such an emergency fund or temporary accumulation is necessary in a trust designed as a provision for sickness, marriage, and a hundred other possibilities. It is difficult to see, however, how the court can read into a trust, in which there is no mention of any such possibility, any intention on the part of the settlor to provide for such contingencies. While it may be desirable as a prudent measure for any one to have on hand an emergency fund for such cases, it is going a little too far for the court to construct such an intention in cases where no such intention is to be found. Even if there were such a direction as to the income in the case of a life tenant, it would be open to the same objection as would any other discretionary withholding of the income.² The learned reader will observe that in some of the cases which have been discussed there was a gift of a residue subject to an annuity, and the court seems to have been influenced by the thought that the annuitant should receive his income without diminution in each year, and therefore there was a reason to sanction an accumulation to meet deficiencies in a subsequent year. It is submitted, however, that in this respect the court has not given sufficient attention to the ordinary rule of construction, that the deficiency in the annuity is not to be made up out of the subse-

⁹ 110 Pa. 95 (1885), stated §663, ante.

¹⁰ The obvious thing to do in such a case is to take out a policy of fire insurance.

¹ *Storrett, J.*, in *Hibbs' Est.*, 143 Pa. 217 at 225 (1891); *Ashman, J.*, in *Lafferty's Est.*, 20 Pa. C. C. 632 at 633

(1898), citing *Eberly's App.*, 110 Pa. 95, *Hibbs' Est.*, 143 Pa. 217, *Schwartz's App.*, 119 Pa. 337. *Eberly's App.* was a case of a fixed annuity; *Hibbs' Est.* has been discussed supra, and in *Schwartz's App.* the direction to accumulate was held to be void.

² See §§540, 545, ante.

quent year's income, unless there is some expression to that effect in the settlement,³ and in no case does there seem to be room to imply a direction to accumulate.⁴

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669. It is clear that the trustee may accumulate the income within reasonable bounds for one year, to provide for the necessary charges and expenses of the trust,⁵ and when properly analyzed it will appear that the case is not that of an accumulation at all. It was first hinted in the dicta in McKee's Appeal⁶ that an accumulation was permissible for the benefit of the cestui que trust. In Eberly's Appeal,⁷ where the subject matter was real estate, the court laid down by way of dictum, the doctrine that an accumulation was proper in order to provide for an annuity out of the residue.⁸ This was followed by Hibbs' Estate,⁹ where, however, the court ignored the circumstance that the subject matter of the trust was personal property, to which the doctrine as laid down in Eberly's Appeal had no application, and overruled the well-considered report of the auditor in the court below. The doctrine again appeared in McIntosh's Estate,¹⁰ and in the recent case of King's Estate¹ the court directed a large sum to be retained in the interests of judicious management, without it clearly appearing what necessity there was for the accumulation. The remarks in Howell's Estate² were dicta, as were also the remarks cited in the note.³ In this condition of the authori-

³ See §618, ante.

⁴ In Thouron's Est., 11 W. N. C. 285 (1882), where there was a bequest of a residue in trust to pay certain annuities, and, upon the death of the annuitants to pay the annuities to the children of a son, it was held that on the death of one of the annuitants, the income theretofore paid to said annuitant should be awarded to the other residuary legatees in equal shares and not to be accumulated. In Rhodes' Est., 147 Pa. 227 (1892), where there was a direction to pay certain annuities and a contingent gift of the residue of the principal after the death of the annuitants, Penrose, J., on p. 231, said that the surplus income, after paying annuities, could

not be accumulated under the provisions of the act, and must be distributed under the intestate laws. The point was not argued nor was it noticed by the reporter in the syllabus.

⁵ See §658, ante.

⁶ 96 Pa. 277 (1880), stated §662, ante.

⁷ 110 Pa. 95 (1885), stated §663, ante.

⁸ For a discussion of this point, see §618, ante.

⁹ 143 Pa. 217 (1891), stated §664, ante.

¹⁰ 158 Pa. 528 (1893), stated §665, ante.

¹ 210 Pa. 435 (1904), stated §667, ante.

² 180 Pa. 515 (1897), stated §666, ante.

³ Gordon, J., in Schwartz's App., 119 Pa. 337 at 349 (1888); Penrose, J., in Mayer's Est., 29 Pa. C. C. 527 at 528

ties no statement can be ventured as to the law. It is apprehended though that the court has misunderstood the doctrine of an accumulation in the interest of judicious management, and has apparently given countenance to the doctrine that income can be accumulated for the benefit, real or supposed, of the cestui que trust. As no limits have been laid down to such accumulations, and there is nothing in the statute which authorizes the exception, it is submitted that these cases, in so far as they countenance an accumulation for more than a period of one year, and except for the business necessities of the trust,⁴ are unsupported by any legal principle.

Preliminary Discussion of Accumulations in Pursuance of an Express Discretion

671. If the discretion is to accumulate the income and dispose of the accumulation, the exercise of the discretion will be a condition precedent, and the case will be that of a gift of the accumulated fund. Such a discretion is, it is apprehended, void under the statute, except where the discretion is to be exercised as to the income of a minor, in which case the discretion would be superfluous, as accumulation is incidental to the income of a minor under the policy of the law, and the trustee cannot exercise his discretion against an order of the court directing a suitable allowance out of the income for support and maintenance. Where there is a vested gift of the income or a vested gift of the accumulated fund, and a discretion to accumulate engrafted thereon, it is apparent that the discretion is void under the general rule of public policy preventing restraints on enjoyment.⁵ There is no distinction on principle between a discretion to accumulate in such case, and a direction to accumulate. The trustee cannot exercise the discretion and add the accumulations to the principal, because the whole income belongs to the life cestui que trust.⁶ He cannot refuse to pay the income to the life cestui que trust because such refusal is a void restraint on the latter's right of enjoyment. These principles are plain and would not

(1904), s. c. 13 D. R. 277; *Peartose, J.*, in *Ferguson's Est.*, 35 Pa. C. C. 466 at 469 (1908).

⁴ Discussed §658, ante.

⁵ See Chap. 23, ante, on Discretion.

⁶ If there is a present gift of a life es-

tate, any discretion to accumulate the income of the life estate is a void direction engrafted on the gift and to be disregarded and the income awarded to the life tenant; see §621, ante.

require any special discussion were it not for the fact that the Supreme Court has, in a number of cases, given countenance to the doctrine that an accumulation under an express discretion is valid. These cases will now be discussed and the validity of the doctrine examined.

Huber's Appeal

672. In *Huber's Appeal*⁷ there was a gift of a share in the residue to a son, Jacob, with a clause as to the life estate as follows: "or at the option of my said executors, I authorize them to appropriate and apply the same for the support and maintenance of my said son Jacob as they may see fit and proper, and so that the same or any part thereof shall not be liable or subject to his disposal, order, debts, control or engagements, and in case of his decease then to appropriate and apply the same for the support, maintenance and education of his child or children." The court said that Jacob took a life estate, and held that upon his death his administrator was not entitled to the accumulated income in the hands of the trustees which had not been applied for Jacob's use, but that it went with the principal. This, of course, means that Jacob in his lifetime could not have compelled the exercise of the discretion; and that the direction to accumulate was valid. The will was dated 1825, and the testator died in 1851; consequently, the act did not apply.⁸ This is the first case in Pennsylvania in which the question of a discretion to accumulate income has arisen. Under the construction of the will adopted by the court, which was that the accumulations were to be added to principal, the discretion was not a restraint on enjoyment, as upon the exercise of the discretion the accumulations went over to those entitled in remainder. It seems, from the dissenting opinion of Agnew, C. J.,⁹ that the chief ground of controversy was over the question of construction as to what was the intention of the testator concerning the accumulations.¹⁰

⁷ 80 Pa. 348 (1876).

⁸ This point seems to have escaped observation, as the case has been cited as an authority for the validity of a discretionary power to accumulate since the act: *Mercur, J.*, in *Barger's App.*, 100 Pa. 239 at 248 (1882); see, however, re-

marks of *Penrose, J.*, in *Grim's Est.*, 12 W. N. C. 354 at 356 (1882).

⁹ On p. 359.

¹⁰ For a similar case where, although there was a clause against involuntary alienation, the court thought it necessary to rest the decision also on the clause of

Barger's Appeal

673. In *Barger's Appeal*¹¹ the testator by item 5 gave his estate to his wife, in trust to pay herself one-third of the income during her widowhood, and the other two-thirds for the use of his children in equal shares. The testator further empowered his trustee to divide his estate at the end of seven years or later among his children and, in her discretion, to retain the whole or any part of each child's proportion until such distribution, and to incorporate the part retained therein; and further directed that no interest in the estate should pass to any child until the time for division, except as provided in item 5, relating to income. An account of the trustee under the will was before the court, the seven years not having expired. One of the children, a son, was deceased, and his share in the income accruing since his death was claimed (1) by his administrator, (2) by a mortgagee of his interest. The court below, Penrose, J., said¹ considering the word "proportion" as meaning income,² that the discretion of accumulating the income was void as regards those children who were not minors, and also void as to the direction to capitalize as to those who were minors. On appeal to the Supreme Court, the Act of 1853 was not mentioned either by the court or counsel.³ Mercur, J., in the Supreme Court said that the provision as to the income was not in conflict with the statute against perpetuities; that the son took no interest therein, and consequently neither his administrator nor assignee could claim the income. If, however, the son took a vested interest in the principal, as he undoubtedly did, he must, in like manner, be

discretion in order to defeat the creditor of the cestui que trust, see *Brubaker v. Huber*, 13 Pa. C. C. 78 (1893).

¹¹ 100 Pa. 239 (1882); s. c. 12 W. N. C. 341.

¹ 100 Pa. at p. 243.

² There is some room to doubt whether the court correctly construed the will. The position of the clause as to retaining the proportion, and the exception in that clause as to item 5, which item relates to income, together with the circumstance that in the clause relating to income the discretion of the trustee is expressly limited to minority, forcibly point to the

conclusion that the word proportion referred to principal and not to income. The court should not be astute to read a direction to accumulate into the will. See *McBride's Est.*, 152 Pa. 192 (1893); *Gray*, Rule Perp., 2 ed. (1906), §633; *Wahl's Est.*, 26 W. N. C. 249, *Penrose, J.*, at 251 (1890); *Derbyshire's Est.*, 11 W. N. C. 22 (1881).

³ Unless by the reference to the statute against perpetuities, by Mercur, J., at the bottom of p. 248, understood by the reporter in paragraph 5 of the syllabus as turning on the statute against accumulations. See as to this §327, ante.

entitled to the income thereon unless it is expressly given to some one else. There was no gift of the income to anyone else, merely a discretion to retain it and add it to the capital. This discretion was clearly void as being in direct conflict with the statute against accumulations. The learned judge further said,⁴ "When the income arising from any share was so retained, it became part of the principal, and did not vest until the share of which it formed a part was allotted." What this is but an accumulation it is difficult to see, and how it can be reconciled with the provisions of the act is still more difficult.⁵

Hibbs' Estate

674. In Hibbs' Estate⁶ the testator created a spendthrift trust for a son, Spencer, for life, the trustee to pay over what portion of the income he should deem necessary; "the balance, if any, to be invested for the son's benefit," the principal of the estate, at the death of the son, to be paid as the trustee might by his will appoint. The account of the trustee was filed during the life of Spencer, who was of age, and who claimed the income accumulated in the hands of the trustee. The court below awarded the accumulations to the son. As the learned judge in the court below, Swartz, P. J., well said,⁷ "The entire income is for Spencer; the manner of its enjoyment alone is limited." On appeal, the Supreme Court reversed, Sterrett, J.,⁸ saying "The power vested in this trustee, to withhold and invest part of the income, must be so construed, if possible, as to make it operative. It does not in terms nor by necessary implication require permanent accumulations. As already seen, the whole income arising during the trust must be used for Spencer's benefit. In common prudence a contingent fund should be provided in anticipation of decrease of income, sickness, and the like; and the natural inference is that the discretion was vested in the trustee with this view. The accumulation was to be temporary, and in the interest of judicious

⁴ At p. 248.

⁵ See remarks of Mr. Gray, Rule Perp., 2 ed. (1906), §722. This case understood by Penrose, J., in Grim's Est., 12 W. N. C. 354 at 356 (1882), as deciding that a provision giving the trustee discretionary power to withhold the income from adult

children of the testator, and at the end of a term of years capitalize it, was not in contravention of the statute against accumulations.

⁶ 143 Pa. 217 (1891).

⁷ At p. 222.

⁸ At p. 225.

management. The record does not show that the amount, already set apart, is unreasonable in the circumstances, and we cannot assume that the trustee has abused his discretion." The learned judge contradicts himself. How can the power to withhold be made operative, and, at the same time, a construction be adopted which will require the whole income to be used for the benefit of the life tenant? If it is withheld and invested, it is not used for his benefit.

Sharp's Estate

675. In *Sharp's Estate*⁹ there was a gift of the residue in trust for two grandchildren and their heirs, the trustee to pay them the income annually, the trust to continue during the life of the father of the cestui que trust, and, at his death, the principal to be divided among them in shares to be determined by the disposition the father should make of his property. By a codicil the interest of R., a grandchild, was given to another trustee, specified in trust, to hold the estate during the life of R., and to pay R. "out of the same, \$30 a month during his natural life;" and more, if R., in the judgment of the trustee, should need it for his maintenance and support, and upon the death of R., in trust to pay his widow, if he left one, \$10 a month while she remained his widow, with further provisions as to the distribution of the principal and remainders over to other grandchildren. The court held that there was an accumulation directed under the codicil, as to the income of R., which direction was void, and that therefore the entire income should be distributed to him. The judge in the court below, Rhone, P. J.,¹⁰ said, "The accumulation of one-half of the income, as provided in the first codicil, is void, and R. takes the same for life, as provided in the original will." The learned judge evidently proceeded on the theory that the accumulation was directed out of the income of a life estate and, therefore, was void, and that the accumulations were to be paid to the life tenant as they amounted to an illegal restraint on use and enjoyment.¹ This case overrules *Barger's Appeal*² and the two cases cannot stand

⁹ 155 Pa. 289 (1893).

¹⁰ At p. 293.

¹ The court said that the direction to accumulate was void in toto, as it was to continue during the life of R. and the

life of his widow. This is probably a misapprehension of the statute.

² 100 Pa. 239, (1882), s. c. 12 W. N. C. 341, stated §673, ante.

together. Sharp's Estate, however, seems to have been overlooked in the later cases.²

Lafferty's Estate

676. In *Lafferty's Estate*³ it appeared from the statement of the auditing judge that the testator gave his residuary estate to his executors, to hold until the youngest of his grandchildren living at the death of his last surviving child should attain full age, in trust, to pay each of his children (naming them) and, by a codicil, the children of a deceased daughter, an annuity of \$2,000 from the date of his death, to be increased or diminished as the income should be more or less than the sum needed, to be free from the debts of the annuitants and, by the codicil, as to the children of the deceased daughter he provided that no guardian or other person should interfere with the discretion of the executor in applying the income to the needs of the children, and that the executors might "withhold the income of the said children, or any of them, who are not so placed as to benefit by its application and their use."⁴ The testator died in 1885. A daughter of the deceased daughter, having attained the age of twenty-one years, claimed to have the accumulated income of the share coming to her by the codicil, paid to her absolutely. The court held that she was not entitled to the accumulation. The auditing judge, Ashman, J., came to the conclusion that the discretion to accumulate was valid,⁵ basing his decision partly

² Confer, *White's Est.*, *Buckley's App.*, 163 Pa. 402 (1894), and 8 D. R. 33 (1898), where there was a gift of a specific sum in trust, with direction to the trustees to pay the income thereof, or so much as in their discretion they should think fit, to A. until he should arrive at twenty-five, and it was held that so much of the income as they did not pay to A. was to be paid to the residuary legatees.

³ 20 Pa. C. C. 632 (1898); see 19 Pa. C. C. 127 (1896), case arising on the same will.

⁴ The word "and" probably should be "to". The phrase does not make sense as it stands. In a previous case arising under the same will, *Lafferty's Est.*, 19 Pa. C. C. 127 (1896), where income which

had accumulated in the hands of the trustee had been paid to the guardian of a minor cestui que trust, the court held, on a petition by the trustee to open and correct the former adjudication, that the decree had been inadvertently made, and that the money should be paid back to the petitioner, as under the terms of the trust full discretion was vested in the trustee as to the income and principal, and all the rights of the cestui que trust could be adjusted upon their arriving at majority.

⁵ The attention of the learned judge was apparently not directed to the clause in the will which directed that the annuities should be increased or diminished according as the income was greater or

on the doctrine of accumulations in the interests of judicious management.⁶ The learned judge also said,⁷ "Besides, a direction to accumulate cannot be implied where the whole income can be used by the trustee at any moment in his absolute discretion. This test has been applied in numerous decisions. In *Mifflin's App.*, 121 Pa. 205, the indestructibility of the limited estate was held to be essential to definition of a perpetuity; and in *Wahl's Est.*, 26 W. N. C. 249, where the donee could demand the rents as they fell due, it was held that a discretion to invest the rents was not void. See also *Cooper's Est.*, 150 Pa. 576; *Rhodes' Est.*, 147 Pa. 227; *Williams's Est.*, 8 W. N. C. 310." Upon this it is to be observed that it is perfectly true that a direction to accumulate is inconsistent with a discretionary power to accumulate. This inconsistency, however, does not solve the problem, as the objection is to the accumulations which take place under the discretion. It is submitted that the learned judge misapprehended the authorities he cited. The power of anyone to destroy a future interest or to demand the rents as they fall due is a necessary consequence of the invalidity of the limitation or the invalidity of the direction to invest, and not the invalidity the result of the power to destroy. The court in banc, Penrose, J., said, in a very short and unsatisfactory opinion, that, since the testator declared the discretion of the trustees with regard to the income was not to be interfered with, the court had no right to say that that discretion was to be confined to the period of minority and, therefore, even though the petitioner was twenty-one years old, she could not receive the accumulations. It is submitted that this reasoning does not at all apply to the real point at issue in the case. The decision is plainly inconsistent with *Sharp's Estate*,⁸ which does not seem to have been called to the attention of the court. Unfortunately, the case was not appealed. The discretion was, it is submitted, void as against the *cestui que trust*.⁹ There was a clause against alienation and the learned judge was evidently influenced by that fact. To uphold the validity of such a clause, objectionable as it is, is one thing;

less. It seems clear that this clause was material, and had it been duly considered, there would have been no reason to direct an accumulation at all after the *cestui que trust* became of age.

⁶ For a discussion of this, see §668, ante.

⁷ At p. 633.

⁸ 155 Pa. 289 (1893).

⁹ See §545, ante.

to say that the trustee can accumulate income in defiance of the statute because of the presence of the clause, is another thing.¹⁰

Spring's Estate

677. In *Spring's Estate*¹¹ the testatrix gave one-third of the residue of her estate in trust, with power in the trustee to pay such portion of the income to the beneficiary as, in his discretion, he might think necessary. The remarks of the court, Elkin, J., as to the accumulations were dicta, as it appeared that all the income due the cestui que trust had been voluntarily paid by the trustee to the beneficiary, who sought to have the trust terminated.¹

Summary of the Cases as to Discretion to Accumulate

678. Huber's Appeal² appears to be the first case in Pennsylvania involving a discretion to accumulate income. That case arose before the act, and the discretion to accumulate was plainly valid, as the court construed the will to mean that the accumulations were to be added to principal, if not paid to the life tenant. In *Barger's Appeal*³ the Supreme Court, apparently under the influence of Huber's Appeal, and without noticing that the case was not in point, overruled the very well-considered opinion of the court below and sustained a discretion to accumulate in the very teeth of the act, without taking the trouble even to refer to its provisions. In *Hibbs' Estate*⁴ the Supreme Court again reversed the better opinion in the court below, and followed the ruling laid down in *Barger's Appeal*. In *Hibbs' Estate* the trustee had discretion to fix the amount which the life tenant should receive, and was expressly directed to accumulate the balance, and the direction to accumulate was upheld. In *Sharp's Estate*,⁵ where the exact interest of the cestui que trust life tenant was fixed by the will, and he was to have more only in the discretion of the trustee, and there was no direction to accumulate, the court read one into the will, and then said that it was void, and distributed the whole income to the life tenant. It is submitted that *Sharp's Estate* overrules *Hibbs' Estate*.

¹⁰ See §649, ante, as to the application of the statute to spendthrift trusts.

¹¹ 216 Pa. 529 (1907).

¹ As to this point see §§523, 525, ante.

² 80 Pa. 348 (1876), stated §672, ante.

³ 100 Pa. 239 (1882), §673, ante.

⁴ 143 Pa. 217 (1891), §674, ante.

⁵ 155 Pa. 289 (1893), see §675, ante.

The decision in *Sharp's Estate* was sound, as there was no direction to pay the income to any one else if the discretion was exercised against the son. Consequently, no one else had any interest in the life estate, and the discretion was a restraint on the absolute enjoyment by the cestui que trust of his life estate. *Lafferty's Estate*,⁶ which seems to be the clearest on the point of discretion, is a county court case, in which *Sharp's Estate* was not called to the attention of the court, and in which the opinion of the court seems to place the decision on other grounds. In *Spring's Estate*⁷ the remarks were dicta. It is therefore submitted that the authorities cannot be said to be clear as to the validity of a discretion to accumulate the income of a vested gift. The only strong case in its support is *Lafferty's Estate*. The case of such a discretion seems plainly within the provisions of the statute as construed in *Washington's Estate*,⁸ and no one has yet been able to suggest any good reason why the statute does not apply.⁹ It has been said that a direction to accumulate cannot be implied where the whole income can be used by the trustee at any moment in his absolute discretion.¹⁰ This is perfectly true, but it is no reason why the statute does not apply to an accumulation under an express discretion. It is, however, difficult to see the distinction, in so far as the statute is concerned, between an accumulation where the trustee is directed to accumulate, and an accumulation where the trustee may or may not accumulate, as he sees fit, but does, in point of fact, accumulate.

*Preliminary Discussion of the Distribution of Income Where the
Direction to Accumulate is Void*

679. The act provides that the rents, issues, interests, etc., so directed to be accumulated, contrary to the provisions of the act, shall go to and be received by such persons as would have been entitled thereto if such accumulation had not been directed.¹

⁶ 20 Pa. C. C. 632 (1898), §676, ante.

⁷ 216 Pa. 529 (1907), §677, ante.

⁸ 75 Pa. 102 (1874), stated §632, ante.

⁹ See dictum, Penrose, J., in *Mayer's Est.*, 29 Pa. C. C. 527 at 528 (1904).

¹⁰ *Ashman, J.*, in *Lafferty's Est.*, 20 Pa. C. C. 632 at 633 (1898).

¹ See §623, ante, for the provisions of the

act. *Gordon, J.*, in *Grim's App.*, 109 Pa. 391 at 397 (1885), and *Schwartz, P. J.*, in the court below in *Schwartz's App.*, 119 Pa. 337 at 342 (1888), said that the act meant that the accumulations should go under the intestate law. *Penrose, J.*, in the court below, in *Martin's Est.*, 185 Pa. 51 at 53 (1898), said that the act does

As has been observed,² although the act applies to implied as well as express directions to accumulate this proviso only appears to cover cases of an express direction. No distinction has ever been taken in practice as to this point.

Distinction Between a Contingent Gift of the Accumulated Fund and a Gift With Subsidiary Direction to Accumulate

680. The distinction between a contingent gift of an accumulated fund and a gift of the income with a direction to accumulate subsidiary thereto is of vital importance in this connection and, at the risk of some repetition, will be again referred to.⁴ The first presents a case calling for the application of the rule against perpetuities and the second for the application of the rule forbidding restraints on enjoyment. The distinction between the two cases is clear: in the first, the income is not presently payable to any one under the terms of the trust, but simply directed to be accumulated and paid over when accumulated to the person designated. The direction to accumulate being void, the gift of the accumulations cannot take effect, the whole disposition of the income fails, and it stands as undisposed of property. In the other case, the income is presently payable under the terms of the trust to some one, and the direction to accumulate being void, the income is still to be paid as provided.⁵ In the first case, when the direction to accumulate is struck out, the gift falls with it, as it is dependent on the direction to accumulate. In the second the gift remains after the direction to accumulate is removed.

Question of Construction Involved

681. There is an extremely difficult question of construction involved in the distinction between the two cases. Of course,

not mean that the liberated income shall go under the intestate law; that when it is distributed under the intestate law it is because there is no one entitled under the provisions of the will. The latter view is probably correct.

² Smith on Executory Interests, §738e.

⁴ See §619, ante.

⁵ Two examples will illustrate the distinction: suppose a gift to A. in trust to accumulate the income for thirty years,

and at the expiration of that period, to pay the accumulations to B. and his heirs; this is a contingent gift to B. Suppose a gift to A. in trust to pay the income to X. for life, and after his death, the principal to B. and his heirs, with direction to accumulate such part of the income as the trustees shall think best, and pay the accumulations to X. once in every five years; this is a vested gift in X.

if there is a vested gift of the income, there can be no gift of the accumulations of that income to a third person. The two are inconsistent and cannot stand together. There may be a gift of the share of the income or a specific part, and a direction to accumulate the balance. Here there are two gifts of the income, and there is no inconsistency. Suppose, however, as frequently happens, the testator gives a fund in trust to pay the income to a son for life, and after his death to distribute the principal among the children of X. then living, with a direction or discretion in the trustee to accumulate a portion of the income and add it to the principal. In so far as there is a gift of the accumulations to a third person, the party entitled to the principal, it comes within the first class. In so far as it is a direction engrafted on the vested gift of the income to the son, it is a direction of the second class. It cannot be both, for the two are absolutely inconsistent. It is often a difficult and sometimes impossible matter to tell which the testator intended.⁶

Stille's Appeal

682. In *Stille's Appeal*⁷ a testatrix gave one-fifth part of the residue of her estate in trust to be divided into two portions—one for each of two granddaughters, to collect the interest and accumulations until each granddaughter arrived at the age of twenty-one years or married, and then to hold the portion with the accumulations, and pay the income thereof to the sole and separate use of such granddaughter for life, and after her death for the use of her children. Each of the granddaughters arrived at the age of twenty-one, and petitioned for the payment to them of the income in the hands of the trustees which had accumulated during their minority. The petition was granted. The Supreme Court, in a very short and unsatisfactory opinion, affirmed the decree of the court below without clearly indicating upon what grounds they based the decision. There was a preliminary question of construction to which the court did not give sufficient attention to

⁶ As stated by Lord Chancellor Chelmsford in *Oddie v. Brown*, 4 DeGex-Jones, 179 at 184 (1859), "Did he (the testator) then by the words which he has used indicate his intention to give the residue to the persons named, with a subsidiary

direction to accumulate, or did he mean that the gift of the residue should be dependent on the previous accumulations?"

⁷ 4 W. N. C. 42 (1877); 11 Phila. 31 (1875); see 1 W. N. C. 249 (1875).

make the opinion clear. Did the gift of the corpus at twenty-one carry with it the intervening income, and give the granddaughters vested equitable interests with the time of payment deferred until twenty-one, or did they take nothing until twenty-one, with no disposition of the intervening income? Dwight, J., in the court below, said that under the will the income clearly did not belong to the minor; therefore, the direction to accumulate was void, not being a direction to accumulate the income of a minor. Then, when he came to consider the question of distribution of the accumulations, he involved himself in a curious fallacy.⁸ He said that under the decision in *Washington's Estate*⁹ the accumulations belonged to the minor, entirely overlooking the fact that the minor was entitled to the accumulations in that case because there was a direction to accumulate his income, whereas, in the case at bar, the learned judge had just concluded that the direction was void because the income did not belong to the minor.¹⁰ The same question of construction has arisen in several other cases which are referred to in the note.¹

Inaccuracy of the Statement That the Accumulation is Void

683. One further inaccuracy of expression should be pointed out. It is frequently said that the accumulations are unlawful or void.² On the contrary it is the direction to accumulate

⁸ The same fallacy appears to be the basis of the decision in *Farnum's Est.*, 191 Pa. 75 (1899). There was a direction similar to the one in *Farnum's Est.*, in *Boyd's Est.*, No. 1, 199 Pa. 487 (1901), but no question was raised as to its validity.

⁹ 75 Pa. 102 (1874), stated §632, ante.

¹⁰ Mr. Justice Trunkey said in *Carson's App.*, 99 Pa. 325 at 329 (1882), that this case was decided without argument. On the contrary, the arguments of counsel as given in the report are ample and very much more to the principle involved in the decision than is the opinion of the court. Counsel at p. 328 said, without hearing argument, which statement seems to be the more accurate of the two.

¹ In *Penrose's App.*, 102 Pa. 448 (1883), the testatrix created a trust of the resi-

due of her estate, and directed that the income should be paid to her granddaughter after she should arrive at the age of twenty-one years, and after her death the principal should be divided among certain persons named. The granddaughter was eight years old at the time of the testatrix's death, and upon attaining her majority the trustees filed their account, from which it appeared that there was income accumulated since the death of the testatrix. Held, that the accumulations should be paid to the granddaughter and not form a part of the corpus of the estate. The decedent was a woman, referred to by *Mercur, J.*, as a man; see opening lines of opinion at p. 449; see also *Ward's Est.*, 13 W. N. C. 282 (1883).

² *Dwight, J.*, in *Stille's App.*, 11 Phila. 31 at 33 (1875); by the reporter in the

which is void. There may or may not be an accumulation. The party entitled to the income may apply to the court in anticipation of any action under the void direction. The order of the court then decreeing the direction void will prevent any accumulation. If an accumulation actually takes place, which frequently happens, and the question is as to the disposition of the sum, it is inaccurate to speak of the accumulation as a void accumulation. The accumulation is an actual existing fact, and cannot be said to be void in any sense of the word. Furthermore, the accumulations can only exist, if they exist at all, because the party entitled, the direction being void, does not apply for them. Since, therefore, they occur by the voluntary act of the owner, it is difficult to see how they can be said to be unlawful. He can receive the accumulations because the direction is unlawful. We are now prepared to consider the law relating to distribution of income embraced under the void direction to accumulate, and will consider two cases: (a) a contingent gift of the accumulated fund; (b) a vested gift of the income with direction to accumulate engrafted thereon.

*Preliminary Discussion of Distribution Where There is a
Contingent Gift of the Accumulated Income*

684. Where there is a void direction to accumulate and a contingent gift of the accumulated fund, we must, in considering what disposition is to be made of the income embraced in the void direction, distinguish three cases: (1) a direction to accumulate the income of a specific bequest; (2) a direction to accumulate the income of the residue; and (3) a direction to accumulate the rents of real estate specifically devised.

Income of Specific Bequest

685. In the case of personal property, where the income to be accumulated arises out of a specific bequest and the direction to accumulate is void, the income of the bequest should on principle result to the residuary legatee.³ If there is no

first paragraph of the syllabus in *Martin's Est.*, 185 Pa. 51 (1898); *Green, J.*, in *Farnum's Est.*, 191 Pa. 75 at 82 (1899).

³ *Gray, Rule Perp.*, 2 ed. (1906), §§704, 718; see dictum of *Penrose, J.*, in *McBride's Est.*, 152 Pa. 192 at 195 (1893);

Matter of Sergeant, 11 Phila. 8 (1875); see *White's Est.*, *Buckley's App.*, 163 Pa. 402 (1894), and case arising on the same will, 8 D. R. 33 (1898); *Weinmann's Est.*, 223 Pa. 508 (1909). In *Howell's Est.*, 180 Pa. 515 (1893), involving the same

residue, the income goes to the next of kin under the intestate law, or by way of resulting trust, according to whether the limitation is at law or in equity.

Income of Residue

686. If the income of a residue or part of a residue is directed to be accumulated and the direction is void, the income released by the statute goes by way of resulting trust⁴ to the heir at law or next of kin, according to the nature of the property.⁵ Where, however, there is a gift of the residue in trust for life, with vested remainders over, and there is a void direction to accumulate the income of the life estate, the accumulations are to be paid to the vested remainderman.⁶ If the remainders were contingent, the rule would probably be otherwise, and the accumulations distributed to the heir at law or next of kin.

Devise of Real Estate Not Part of Residuary Estate

687. In the case of a specific devise of real estate not forming part of the residuary estate, where there is a direc-

will as was before the court in *Howell's Est.*, 5 W. N. C. 430 (1878), as to which see §690, n. 9, post, there was a gift in trust of the sum necessary to produce a certain income for the wife of the testator for life, with a limitation over at her decease of part of the fund, and the remainder thereof to such of the testator's nephews and nieces as would be living at her decease. The residuary estate was left in trust for a grandchild for life. The wife was dead, and the fund set aside had produced a surplus of income. The court below held that the accumulations fell into the residuary estate. On appeal, the Supreme Court, in an opinion by Mr. Justice Fell, affirmed, saying, however, that the right to surplus income vested in the testator's grandchild, citing as authority *Rhodes' Est.*, 147 Pa. 227, and the opinion of Penrose, J., therein, entirely overlooking the fact that *Rhodes' Est.*, was a case of an accumulated income of a residue, which plainly went to the heir at law

or next of kin, and that the case under discussion was a case of accumulated income of a specific bequest.

⁴ See §151, ante.

⁵ *Mellon's Est.*, 16 Phila. 323 (1884), s. c. sub. nom. *Gowen's App.*, 106 Pa. 288 (1884); *Rhodes' Est.*, 147 Pa. 227 at 231 (1892); *Martin's Est.*, 185 Pa. 51 (1898); *Edwards's Est.*, 190 Pa. 177 (1899); *Mayer's Est.*, 29 Pa. C. C. 527 (1904), s. c. 13 D. R. 277. In *McKee's App.*, 96 Pa. 277 (1880), where the same person was the residuary legatee and entitled under the intestate law, the court below said that it did not make any difference how he took. In *Grim's App.*, 109 Pa. 391 (1885), the decision of the court below refusing to award the income to the residuary legatee, was affirmed. Scott, on Accumulations, §172, understands the case as awarding it to the residuary legatee.

⁶ *King's Est.*, 210 Pa. 435 (1904)

tion to accumulate, which is void, the income out of which the accumulation is directed goes by way of resulting trust to the residuary devisee, if any, and, if none, to the heir at law or next of kin.⁷ In Schwartz's Appeal,⁸ where there was a specific devise of real estate in trust to pay a monthly allowance to the testator's wife, and to invest the balance of the income, if any, etc., with no express disposition thereof, which direction to accumulate the court held was void, the accumulations were distributed under the intestate law, the judge of the court below, Schwartz, P. J., saying that, under the act of 1853, the income was to be distributed as in the case of intestacy. The Supreme Court affirmed the decision on appeal. There were so many other points in the case that this one seems to have been lost sight of. The result reached seems to be clearly objectionable.⁹

As to Acceleration

688. The statute against accumulations is a positive command of law, defeating intention. The intention must first be ascertained, and then, if when so ascertained it violates the act, the transgressive part must be cut out of the trust absolutely and entirely. Consequently, where there is a gift of an accumulated fund, the vesting of the gift being dependent on the accumulations or some other event, and the direction to accumulate is void, the accumulations can never be lawfully accomplished, and the gift of the accumulated fund fails utterly, or, as it is said, it is not the effect of the statute to accelerate the gift. The act cannot destroy the gift and accelerate it at the same time.¹

⁷ See §§151, 460, ante.

⁸ 119 Pa. 337 (1888).

⁹ In *Mitcheson's Est.*, 11 W. N. C. 547 (1882), it appeared that the parties entitled could take either as residuary legatees or under the intestate laws.

¹ Dictum, Penrose, J., in *Grim's Est.*, 12 W. N. C. 354 at 356 (1882), quoting Theobald on Wills, ed. of 1881, pp. 447 and 448; dictum, Penrose, J., in *Mitcheson's Est.*, 11 W. N. C. 547 at 548 (1882), where he said, "The question has not heretofore been decided in this state, but it

is safe to assume that the doctrine of the English cases will not be departed from." Penrose, J., in *Mellon's Est.*, 16 Phila. 323 at 326 (1884); Gray, *Rule Perp.*, 2 ed. (1906), §694, and cases cited; *Martin's Est.*, 185 Pa. 51 (1898); see also remarks of Penrose, J., in *Ferguson's Est.*, 223 Pa. 530 at 533 (1909). The two obscure cases of *Potter's Est.*, 36 L. L. 460 (1879), and *Myer's Est.*, 42 L. I. 5 (1885), may, be considered as overruled, in so far as they are in conflict with the principle laid down in the text.

Preliminary Discussion of Distribution Where the Direction to Accumulate is Subsidiary to the Gift of the Income

689. Where there is a vested indefeasible gift of the income and a direction to accumulate engrafted thereon the direction is void. The case stands as if it had never been inserted, and the owner of the income may require that the income be paid to him as it accrues, or as it is said, he may stop the accumulations.² Mr. Gray says that such direction being destructible by the person entitled, the accumulations resulting in consequence of such a direction are not obnoxious to the Thellusson Act³ or the rule against perpetuities. The interest in the income is vested, and the direction to accumulate is an interference with the vested interest, and as such, is void, if at all, as a restraint on the enjoyment of an absolute interest in property.⁴ The direction to accumulate is destructible because it is invalid. Destructibility is the consequence of the invalidity, and not the cause.⁵

Vested Gift of an Accumulated Fund

691. Where, although there is a direction to accumulate, there is a vested gift of the accumulations, even though postponed in time of enjoyment,⁶ the court will construe the limitation as a present vested gift of the income with a direction to accumulate engrafted thereon, in which case the direction to accumulate is void, and the party entitled to the income can stop the accumulations and have the income paid over to him as it accrues.⁷

² Rule Perp., 2 ed. (1906), §672.

³ Rule Perp., 2 ed. (1906), §692.

⁴ See §§545, 621, ante.

⁵ In the following cases the direction to accumulate was subsidiary to the gift of the income and, the direction being void, the income was payable to the cestui que trust; *Sharp's Est.*, 155 Pa. 289 (1893), stated §675, ante; *Young's Est.*, 16 D. R. 541 (1907).

⁶ Thus, a direction to accumulate and pay the accumulations to A., a living person, or a direction to pay A. a certain sum out of income. Either would be construed

to mean a direction to pay him the income until a certain sum should be received.

⁷ Gray, Rule Perp., 2 ed. (1906), §672. The learned author says that the direction is an illegal restraint on alienation. It is submitted that the direction is an illegal restraint on enjoyment. It is to be distinguished from the case of a gift of the income to a person until a certain event, as, until she should receive her share of the proceeds of certain real estate directed to be sold, which is not a case of a direction to accumulate at all; *Brisben's App.*, 70 Pa. 405 (1872).

Direction to Accumulate a Certain Sum

692. The same principle applies to another class of cases, namely, where there is a direction to pay a certain sum to a particular person as soon as sufficient interest is accumulated for the purpose. Mr. Gray says⁸ that the direction is valid, as the legatee has a vested interest which gives him, if he chooses to exercise it, the right to demand the income as it falls due. The very fact, however, that he can stop the accumulation, shows that the direction is invalid. The case is no other than that of a direction to accumulate. This is simply a principle of construction; the courts have said that the testator meant to give the income absolutely, and have construed the gift as that of a vested interest, with a direction to accumulate as subsidiary thereto.

Wahl's Estate

693. In *Wahl's Estate*⁹ there was a bequest of \$500 to D. so soon as there was sufficient interest accumulated for that purpose; "but if my executor finds that the money can be used to the advantage of said D., then he is to pay it to D., but if D. should die in the meantime, the said legacy to become part of my estate." Held, that D. had a vested interest which gave him the right to demand the income as it fell due, which was not affected by the gift over in the case of his death before payment. It appeared at the audit that the executor had paid D. the \$500 and interest thereon, and exceptions by the heirs at law to these payments were dismissed.

Rogers's Estate

694. In *Rogers's Estate*¹⁰ the testator, inter alia, made a specific devise of a lot to three grandchildren, and then directed his executors to accumulate the income until the sum of \$10,000 should be realized, whereupon that sum was to be spent, upon certain contingencies which might be remote, in building a house upon the lot devised to the three grandchildren. The residuary estate was given to testator's daughters and daughter-in-law, and the whole estate was subject to certain annuities. The testator further directed that when all these

⁸ Rule Perp., 2 ed. (1906), §672.

C. 309.

⁹ 26 W. N. C. 249 (1890), s. c. 8 Pa. C.

¹⁰ 179 Pa. 602 (1897).

instructions were carried out, the surplus should be divided among his daughters and daughter-in-law. Upon the filing of the executor's account it appeared that the three grandchildren were under age, and the executors had on hand a fund composed of the net income since the death of the testator. At the then income of the estate, the \$10,000 would be accumulated within five years after the testator's death. From the statement of the counsel for the appellee, it would appear that the lot devised to the grandchildren was unproductive. If this was so, the accumulations were of income from the residuary estate, and the case presented is that of a direction to accumulate income of a residue until a specified sum is realized, and then pay that sum to a particular person. The court below, in an opinion by Over, J., affirmed on appeal by the Supreme Court, construed the gift as a vested gift to the grandson, with direction to accumulate engrafted thereon, and, as the donees were minors, awarded the accumulations to the trustees until the former came of age.

Preliminary Discussion of Distribution of Income Embraced in a Void Direction to Accumulate For a Charity

695. A direction to accumulate for a charity is not within the provisions of the statute against accumulations,¹ consequently, the income where the direction is void is not distributable under the proviso relating to distribution of income where the direction to accumulate is subject to the act.² Two cases may arise: first, where there is a vested gift to the charity with a direction to accumulate engrafted thereon; second, where there is a contingent gift of the accumulated fund to a charity.

Distribution Where There is a Vested Gift to the Charity

696. If there is a vested gift to the charity, with a super-added direction to accumulate the income, it is probable that the direction to accumulate is void, and that the charity can stop the accumulations and receive the income as it falls due.³

¹ See §653, et seq., ante.

² See §656, ante, for a discussion of

³ As to which see §679, et seq., ante.

this point.

Contingent Gift of the Accumulated Fund

697. It is not clear what the law is as to the distribution of income in the case of a void contingent gift of the accumulated fund to a charity. In the case of *Hillyard v. Miller*,⁴ where there was a direction to accumulate for charitable purposes violating the rule against perpetuities, the court held there was a resulting trust to the heir at law, as the gift was to be considered as if the void direction had never been inserted. In the case of *Curran's Appeal*,⁵ where there was a direction to accumulate a sum of money which would not have been realized until a remote period, the court said that the gift was preserved by the provisions of the Act of April 26, 1855,⁶ and that the next of kin were not entitled to enforce a resulting trust. The provisions of this section are discussed more at length in the ensuing part of the treatise relating to the doctrine of *cy pres*. It is there suggested⁷ that the doctrine of *cy pres* does not apply except where there is a vested gift to a charity. If this is sound, *Curran's Appeal* is likely to be overruled; if it is not, the law probably is the same with respect to a contingent gift of the accumulated fund as it is where there is a vested gift of the fund with a superadded direction to accumulate. As no other cases have been found no statement can be ventured as to the law.

⁴ 10 Pa. 326 (1849).

⁵ 4 Penny. 331, see pp. 339, 340 (1884).

⁶ §10 P. L. 328, re-enacted by the Act

of May 23, 1895, P. L. 114, for the provision of which act, see §735, ante.

⁷ See §777, post.

CHAPTER 26

GIFTS TO CHARITIES

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Preliminary Discussion

715. A gift to a charity, for reasons which have already been pointed out,¹ does not call for the application of those principles of public policy which find their expression in the three rules of law which we have been discussing.² As it is desirable, for many reasons, to sustain the validity of charitable gifts, and the strict application of these rules would invalidate the greater number of such dispositions, an exception has been allowed in order that the charitable impulses of the community may have reasonable opportunity to assert themselves. The exception, therefore, is only allowed from the necessity of the case, and is to be carried no further than the occasion

¹ See §13, ante.

² The rule against perpetuities, the rule forbidding the creation of restraints on

alienation, and the rule forbidding the imposition of restraints on use and enjoyment.

requires. As, however, the law on the subject is somewhat intricate, and there are a number of special principles involved, it has been found necessary to devote a separate chapter to the discussion. We shall first examine the nature of a charitable object and then point out the particulars in which the rules against perpetuities, etc., apply.

Preliminary Discussion of the Nature of a Charitable Object

716. A consideration of the reason why gifts for charitable objects are allowed as exceptions to the principles of public policy which we have discussed, will be helpful in forming a correct idea of a charitable object.³ This principle of public policy is against the settlement of property for the benefit of an individual or his descendants. Therefore, a gift, which is altruistic, considered from the standpoint of the donor, toward the community at large, is charitable. The character of the object is the material point. And the notion that the motive of the donor is material has long since been exploded. There is a difficulty which springs from a looseness in the use of the word charity. A thing is said to be a charity, such as an act of charity, the giving of something to the poor, and, so also, an institution or a fund producing income for charity is said to be a charity. The word, it will be observed, is used in two different senses, one as meaning the giving, the other as the thing given. It is also used as meaning the object of the gift, and the latter is, it is apprehended, the proper legal meaning and is the sense in which it is used in this treatise.

Definition by Mr. Justice Gray

717. Many attempts have been made to define a charitable object. The best perhaps is that by Mr. Justice Gray⁴ which is as follows: "A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works.

³ See §13, ante, for a discussion of this point.

⁴ In *Jackson v. Phillips*, 14 Allen, 539 at 556 (1867).

or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." A gift to a charity is distinguishable solely by the character of the object, and may possibly be in violation of some rule of law,⁵ as, for instance, the rule against perpetuities, and yet be charitable. That part, therefore, of the learned judge's definition which requires that the gift be consistent with existing laws, seems to be inaccurate. Furthermore, the gift may be to a definite charitable corporation. The definition, therefore, appears to be too narrow in so far as it is confined to indefinite objects.

Not Possible to Define a Charitable Object

718. It is impossible to accurately define a charitable object. The court cannot bind itself by defining a charity, for if it did so, there would be danger, on the one hand, of unduly limiting the altruistic impulses of the community or, on the other hand, of affording an opportunity for dispositions violating those principles of public policy⁶ which find their expression in the three rules of law which we are considering.⁷ A number of cases have been collected in the note,⁸ illustrating some

⁵ Perry, *Trusts*, 5 ed. (1899), Vol. 2, §715.

⁶ See §§11-13, ante.

⁷ The rule against perpetuities, the rule forbidding the creation of restraints against alienation, and the rule forbidding the imposition of restraints on enjoyment.

⁸ In the following cases, the objects indicated were held charitable:

RELIGIOUS: To the support of the Gospel among the colored people of the cities of Pittsburg and Allegheny: *Pulpress v. Church*, 48 Pa. 204 (1864). For Methodist camp-meeting: *Saxton v. Mitchell*, 78 Pa. 479 (1875). For religious congregations, churches, and meeting-houses: *App v. Congregation*, 6 Pa. 201 (1847); *Beaver v. Filson*, 8 Pa. 327 (1848); *Griffitts v. Cope*, 17 Pa. 96 (1851); *Keiper's App.* 124 Pa. 193 (1889) (Church); *Fidelity Ins. Co.'s App.*, 99 Pa. 443 (1882); *Brown v. Church*, 23 Pa. 495 (1854); *Latahaw's App.*, 122 Pa.

142 (1858); *Church's Petition*, 166 Pa. 43 (1895). For Protestant Episcopal Church: *Nicholson v. Daniel*, 152 Pa. 461, (1893). For public use schoolhouse, meeting-house and graveyard: *Trustees v. Sturgeon*, 9 Pa. 321 (1848). Schoolhouse and house of public worship: *McKissick v. Pickle*, 16 Pa. 140 (1851). Parsonage and burial ground: *Supplee v. Hansell*, 17 Pa. 384 (1851). For graveyard: *Pearson v. Hartman*, 100 Pa. 84 (1882). A devise of real estate to a church in trust to devote the income to keeping testator's family lot in a graveyard in order, and to distribute the balance, within specified limits as to amounts, to home or foreign missions for the spread of Christianity, and the residue among the needy poor of the vicinity, as the trustees and their successors may think best: *Nau-man v. Weidman*, 182 Pa. 263 (1897). For foreign missionary work: *Presbyterian Board v. Culp*, 151 Pa. 467 (1892). To the

Franciscan Brothers of Altoona, Pa.: *Hodnett's Est.*, 154 Pa. 485 (1893). A corporation was organized under the Act of April 29, 1874, P. L. 73, "for the purpose of uniting the persons so to be incorporated socially, for the improvement of their intellectual and moral condition, by the dissemination of scientific truths, by means of literature, music, lecture and debate." It appeared that the corporation had no capital stock and transacted no secular business. Its meetings were held on Sunday, and it was wholly dependent upon voluntary contributions of its members. One member testified that the league was opposed to all isms, and that its object was the investigation of truth. A witness testified that he had heard, on a Sunday evening, a lecture against the Christian religion, and that a discussion, in the same spirit followed the lecture. Held, that a devise or bequest to such an organization was given for a religious use within the meaning of the Act of 1855: *Knight's Est.*, 159 Pa. 500 (1894). For the support of clergymen of a particular denomination: *Trustees v. Sturgeon*, 9 Pa. 321 (1848). For the education of clergymen of a particular denomination: *Young v. The Church*, 200 Pa. 332 (1901).

IN EASE OF THE PUBLIC: To county commissioners for a courthouse and jail: *Seebold v. Shitler*, 34 Pa. 133 (1859). For a college and library: *Miller v. Porter*, 53 Pa. 292 (1866). Memorial hospital: *Hospital v. Penna. Co.*, 158 Pa. 441 (1893). For improvement of a town: *Thomas v. Elmaker*, 1 Pars. 98 (1844). Public park: *Long's Est.*, 204 Pa. 60 (1902). In re Trustees for Kane Boro. Park, 177 Pa. 638 (1896), *semble*. Planting and renewing shade trees; to endow a professorship of fine arts; towards the erection and support of an agricultural college: *Cresson's App.*, 30 Pa. 437 (1858). To protect citizens of African descent in the enjoyment of their civil rights, and to prevent discrimination against them: *Lewis' Est.*, 152 Pa. 477

(1893). To the Monthly Meeting of the Friends of Philadelphia, to be applied as a fund for the distribution of good books among the poor people in the back part of Pennsylvania, or to the support of an institution or free school: *Pickering v. Shotwell*, 10 Pa. 23 (1848). "Gifts in a will of \$500,000, for the erection of a memorial monument or arch in a public park, \$50,000, for the construction of a children's playhouse and grounds, and the residue of the estate in trust to apply the income thereof to the maintenance and preservation of such structures and grounds forever * * * and it is immaterial that the testator has directed that a bronze statue of himself with his name underneath in large letters shall be placed upon the memorial, and that a mural tablet shall be placed in the playhouse with an inscription to the effect that the house was erected by the testator and his wife in memory of their son." *Smith's Est.*, 181 Pa. 109 (1897). For a case of a curious and involved bequest to the Theological Seminary of Princeton, N. J., characterized by counsel as an uncertain, visionary and obscure, unreasonable, tyrannous, unconstitutional and incapable of rational interpretation. Where the court held that the trustee could take, the trust not being annexed to the vesting of the legal title, and did not pass on the question whether the trust was unlawful, see *Newell's App.*, 24 Pa. 197 (1855). Testator gave certain legacies to three charitable corporations, with directions that if the beneficiaries at any time supported the cause of prohibition, the legacy should become forfeit and be paid to the Free Library of Philadelphia. The three corporations declined to take the gifts with the annexed condition, and in the contest between the Free Library and the residuary legatee, the court awarded the fund to the Free Library: *White's Est.*, 174 Pa. 642 (1896). To build a monument to George Washington: *Society of the Cincinnati's App.*, 154 Pa.

621 (1893). In *Daly's Est.*, 208 Pa. 58 (1904), it was decided that the fact that the charity depended in part upon the contribution of others was immaterial. In that case the beneficiaries were expected to contribute something for the support of the charity. The court is not confined to the objects enumerated in the preamble of the Statute of 43 Eliz.; *Witman v. Lex*, 17 S. & R. 88 (1827).

FOR EDUCATION AND LIBRARIES: For the education of young students in the ministry of a particular congregation: *Witman v. Lex*, 17 S. & R. 88 (1827). For sectarian religious school: *Price v. Maxwell*, 28 Pa. 23 (1857). For an academy of learning: *City v. Bicknell*, 35 Pa. 123 (1860). Perpetual charity for the education of poor orphans: *Brown v. Hummel*, 6 Pa. 86 (1847). For a free library which may be established in the city of Philadelphia: *Pepper's Est.*, 154 Pa. 331 (1893). For the Philadelphia Library: *Williams's App.*, 73 Pa. 249 (1873). A gift to Princeton University: *McMillen's App.*, 11 W. N. C. 440 (1882). A gift to Ursinus College: *Amole's Est.*, 32 Super. Ct. 636 (1907). A gift to the Pennsylvania Museum and School of Industrial Art: *Phillips's Est.*, 1 D. R. 311 (1892).

FOR THE RELIEF OF THE POOR: For the poor of a certain township: *County of Lawrence v. Leonard*, 83 Pa. 206 (1877). Poor young men of a certain county: *Mann v. Mullin*, 84 Pa. 297 (1877); *Brookville Boro. v. Startsell*, 207 Pa. 347 (1904). For the purchase of bread for the poor of a certain congregation: *Witman v. Lex*, 17 S. & R. 88 (1827). Shelter to homeless people at night irrespective of creed, color or condition; *Croxall's Est.*, 162 Pa. 579, (1894). For the relief of homeless, indigent orphans without regard to race or religion: *Stevens's Est.*, 164 Pa. 209 (1894), same will 200 Pa. 318 (1901). For a hospital: *Seagrave's App.*, 125 Pa. 362 (1889); *Philadelphia v. Elliott*, 3 Rawle 170 (1831). "To go to the benefit of the poor of Eldred

Township, Warren County, Pa. * * * To have the use and nothing more * * * for their benefit and use * * * and when fully proven up to be managed by the overseers of the poor in said county for the benefit of Eldred Township": *Trim's Est.*, 168 Pa. 395 (1895). To the committee for the relief of the worthy poor of Hanover: *Young v. Church*, 200 Pa. 332 (1901).

HOUSES, ASYLUMS: Home for invalid gentlemen and mechanics: *Dickey's App.*, 73 Pa. 218 (1873). "To furnish homes, shelter, protection and instruction and improvement to industrious girls and women in or out of employment at the least possible cost to them, commensurate with maintaining the proper sense of self-respect on the part of the beneficiary," is a public charity; not indefinite and impossible of execution because dependent on the contributions of others: *Daly's Est.*, 208 Pa. 58 (1904). For the support of disabled Presbyterian clergymen: *Fisher's App.*, 162 Pa. 232 (1894).

MISCELLANEOUS: Trust to lend money at five per cent. to young unmarried artificers: *Apprentices' Fund Case*, 13 Pa. C. C. 241 (1893), probably overruling *Hillyard v. Miller*, 10 Pa. 326 (1849), where a trust to lend money to farmers and mechanics was said not to be a charity; see *Franklin's Est.*, 150 Pa. 437 (1892). To be applied to increase the salaries of the teachers of a certain school: *Price v. Maxwell*, 28 Pa. 23 (1857). To distribute premiums among ingenious men and women who shall make useful inventions: *Phila. v. Fox*, 64 Pa. 169 (1870). See also list given in the note to *Franklin's Est.*, in 9 Pa. C. C. 484 at 493 (1891).

In the following cases the objects indicated were held to be non-charitable:

"The Infidel Society of Philadelphia, hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics, etc.": *Zeisweiss v. James*, 63 Pa. 465 (1870). To a beneficial society whose benefits and benevo-

of the objects which have been held charitable or non-charitable, from which the learned reader can form a tolerably accurate idea of the nature of a charity. It seems to be a common notion that a gift to a charity is a gift to an uncertain or indefinite object or indefinite number of persons,⁹ and that if the object is certain the gift cannot be charitable.¹⁰ This idea is inaccurate. A gift may be for indefinite or definite objects, and in either case the objects may or may not be charitable. That this is so will appear from the discussion of the nature of indefinite and definite objects which is next in order.

Preliminary Discussion of the Nature of Indefinite Objects

720. The objects of the gift may be said to be indefinite in two senses: (1) where there is an uncertainty in the language describing the object, a case of defective designation; (2) where the objects are in themselves uncertain and indefinite, although the language is free from ambiguity. A case of defective designation occurs where the donor has expressed himself in so vague or imperfect a manner, that it is impossible to ascertain from the language used what objects are to take. In such case evidence is admissible to repair, as it is said, the defective designation,¹ and a discussion of the principles involved belongs more properly to a treatise on the law of wills. Where the language of the gift is clear, the objects may be said to be uncertain in three cases: (1) where the gift is to an unascertained person, an example of which would be a gift to the heir of A., a living person: gifts of this kind do not concern us here, as they are clearly non-charitable. (2) A gift to a class. (3) A gift to a non-personal object, as a gift to build a college, repair a grave, or the like. Gifts of the third class can arise only where there is a trust, and the discussion of them will be postponed to another part of the

lence are confined exclusively to its contributing members: *Swift v. Beneficial Soc.*, 73 Pa. 362 (1873). *Odd Fellows' Lodge: Babb v. Reed*, 5 Rawle, 151 (1835) dictum; *Blenon's Est.*, *Brightly*, 338 (1843). Trust for an "English school-house and no other purpose:" *Kirk v. King*, 3 Pa. 436 (1846).

⁹ See *Gray, Rule Perp.*, 2 ed. (1906), §680.

¹⁰ *Pepper & Lewis's Digest of Decisions*, Vol. II, col. 2754; *Gray, Rule Perp.*, 2 ed. (1906), §680.

¹ For cases involving this principle, see *Domestic & Foreign Miss. Society's App.*, 30 Pa. 425 (1858); *Pepper's Est.*, 154 Pa. 331 (1893); *Croxall's Est.*, 162 Pa. 579 (1894); *Amberson's Est.*, 204 Pa. 397 (1903). For an example of an insensible trust, see *Newell's App.*, 24 Pa. 197 (1855)

treatise.² Our discussion will, therefore, for the present be confined to the case of a gift to an indefinite class.

Definition of an Indefinite Class

721. If the class will close at a certain time the objects are definite.³ Where, however, there may be members of the class existing for an indefinite period in the future, and it can never be said with any reasonable certainty that the class will ever close, there is a gift for an indefinite class.⁴ In like manner the objects may be indefinite, although the class closes at a definite time, as where the members cannot be ascertained within practical limits. The real distinction between the case of a definite and indefinite gift lies in the size of the class. If the class is of such a size that it is reasonably possible within practical limits to ascertain the members, it is a gift to a definite class. If it is so large that the members cannot be so ascertained, it is a gift to an indefinite class.⁵ Where the class is indefinite, there is an important distinction between a direct gift and a gift in trust. These two cases will therefore be discussed separately.

General Principles Relating to Gifts at Law to an Indefinite Charitable Class

722. A gift to an indefinite class could not take effect at law, as the principles of the common law probably growing out of the doctrine of seisin⁶ would not permit a title to be divided

² See §724, post.

³ For the principles relating to the closing of a class, see §§442-444, ante.

⁴ Thus, a gift to the great-great-grandchildren of A. is definite, because it can be certainly said that there will be a time when all the great-great-grandchildren can be ascertained. In the case, however, of a gift to the poor of the city of Philadelphia, it cannot be said that there will ever be a time when there will be no poor in the city. It is possible that poor people will exist for an indefinite period in the future who will be entitled to take under the gift. If the gift is to the great-great-grandchildren of A., it is called a gift to a class, and treated accordingly.

If it is a gift to the poor of a certain place, it is none the less a gift to a class but it is called a gift for an indefinite object.

⁵ Thus, a gift to all male citizens of the city of Philadelphia above the age of thirty-five, is a gift to a class, which is void as being too uncertain to take effect. It would be practically impossible for the court to ascertain who the persons are who would be entitled to take. No case as to this point has arisen, for although it is rather difficult to state accurately just what gift to a class is valid and just what is not, it is not difficult in practice to recognize the distinction.

⁶ See §39, ante.

among so many co-owners.⁷ The chancellor had no power under his equitable jurisdiction, as there was no trust declared, to meddle with the gift. If the objects were charitable, the property was disposed of by the king by an order under his sign manual.⁸ As the prerogative power did not exist in Pennsylvania, such a gift was said to be void before the Acts of 1855 and 1895¹⁰. These acts provide that no disposition of property for a charitable use shall fail by reason of the objects being indefinite, and make no distinction between a gift in trust and a direct gift to a charity. There is, therefore, room to argue that since the enactment of this legislation the courts possess the prerogative power in so far as it is necessary to carry out gifts at law to an indefinite charitable class. The remarks of the judges are conflicting,¹ and the law is far from clear. There seems to be no reason to restrain these acts to gifts in trust. The court has actually sustained gifts at law to an indefinite charitable class,² but it is difficult to see how such gifts can be supported except under the provisions of these acts.

Gifts at Law to Unincorporated Associations

723. A gift to an unincorporated association is a gift to a class and properly governed by the same principles. The case, however, requires separate discussion. Where the gift is to a present existing unincorporated society or association, the objects may be said to be definite or indefinite, according to whether the donor intended that only the present members should take, in which case it would be definite, or whether he intended all present and future members to take, in which case it would be indefinite. Mr. Gray says that the distinc-

⁷ Where there is a direct gift to a definite charitable object there is no difficulty in sustaining the gift at law. See §728, post.

⁸ Perry, *Trusts*, Vol. 2, §§718, 719, 5 ed. (1899); Gray, *Rule Perp.*, 2 ed. (1906), §608, n. 1, where the modern English practice is explained. See also opinion of Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen, 539 (1867); dictum Sharswood, J., in *Mann v. Mullin*, 84 Pa. 297 at 301 (1877).

⁹ Dictum Sharswood J., in *Mann v. Mullin*, 84 Pa. 297 at 301 (1877): see,

however, the case of a gift to an unincorporated society, discussed §723, post.

¹⁰ See §735, post.

¹ The dicta of Sharswood, J., in *Mann v. Mullin*, 84 Pa. 297 at 301 and 302 (1877), and Sterrett, J., *Presbyterian Board v. Culp*, 151 Pa. 467 at 471 (1892), support the validity of the gifts at law since the acts. There is a dictum contra by Ashman, J., in *Houston's Est.*, 28 Pa. C. C. 285 at 287 (1903), a. c. 12 D. R. 121, 19 Montg. 151.

² See §723, n. 6, post.

tion in intention³ of the donor is not between a gift to a class consisting of certain individuals and a gift to a class consisting of other individuals, but between a gift to a society as a continuing entity abstracted from any individuals, and a gift to individuals. It is apprehended, however, that it is almost too much to infer that when the testator makes a gift to the members of a society he means to benefit the society as an entity, and not that he means to benefit the individual members of the society. The latter will certainly be the beneficiaries of the gift,⁴ and it is apprehended that the notion that the society is an entity is a fiction.⁵ The earlier decisions in Pennsylvania are in hopeless conflict⁶ and no recent case has been found, but it is probably the law that a gift at law to an indefinite class of charitable objects is valid under the legislation referred to in the last section. It may also be observed, before leaving the subject, that the residence without the

³ Rule Perp., 2 ed. (1906), §901.

⁴ In *Swift v. Easton Beneficial Society*, 73 Pa. 362 (1875), there was a direct gift of a sum of money to the Old Easton Benef. Society, apparently unincorporated, which was held to be non-charitable. The gift was therefore held valid under §11 of the Act of 1855, invalidating a charitable gift contained in a will executed within one calendar month of the testator's decease. See §737, post. This case can be sustained only on the ground that the gift was to the present members of the society. Had the gift been to the present and future members, it would have been void as violating the rule against perpetuities, even though as a non-charitable gift it survived under §11 of the Act of 1855, and if the object had been charitable would have been valid under §10 of the same Act. In the controversy as to whether the gift was charitable the other point was perhaps lost sight of.

⁵ Somewhat the same fiction as that already discussed in connection with remainders to a class; see §69, ante.

⁶ In these cases the court applied the correct principle, and held the gift void at law: *Morrison v. Beirer*, 2 W. & S. 81 (1841); *Kirk v. King*, 3 Pa. 436 (1846).

In these cases the court overlooked the difficulty and sustained the gift: *Martin v. McCord*, 5 Watts, 493 (1836). In *Zimmerman v. Anders*, 6 W. & S. 218 (1843), there was a devise of a vested remainder in real estate to an unincorporated society. The society subsequently became incorporated and then brought ejectment against the heirs at law and recovered. The decision is difficult to sustain on the theory of the society taking the legal title. It may be said, however, that the legal title descended to the heir at law, subject to the terms of the trust; see *Kirk v. King*, 3 Pa. 436 (1846), and the devisee upon becoming incorporated was entitled to enforce its equitable title in an action of ejectment. In *Pickering v. Shotwell*, 10 Pa. 23 (1848), a devise of real and personal estate to the Monthly Meeting of Friends of Philadelphia for the Northern District, an unincorporated society, to be applied as a fund for the distribution of good books among poor people in the back part of Pennsylvania, was sustained. See however order of the court, p. 24, *Evangelical Ass'n's App.*, 35 Pa. 316 (1860) personal property accord. It seems from the remarks of Strong, J., at pp. 319 and 320, that the doctrine is confined to religious associations.

limits of the State of a portion of the members of any religious, literary, charitable or beneficial society or association, otherwise qualified to hold real or personal estate, does not incapacitate the society or association from taking or holding any property given them not exceeding the value limited by law.⁷

Gift in Trust for Indefinite Objects

724. Where, however, the gift was in trust for indefinite objects, the chancellor would have jurisdiction to control the trustee in the disposition of the fund, upon the same principles as are involved in his jurisdiction over every other trust, and would refuse to follow the strict rules of the common law where the objects were charitable. It is generally said that in every trust there must be a definite cestui que trust, and the reason usually assigned is that there must be some one in esse to enforce the trust, which reason, it is said, does not apply to a charitable trust, because the attorney-general will proceed on behalf of the charity.⁸ In considering this, we must distinguish between gifts to an indefinite class and gifts to non-personal cestuis que trustent which are also said to be indefinite.⁹ In the first case, there is some one to enforce the trust, only the class is so large that the greater number of the persons entitled makes it less likely that any one will proceed. Any person coming within the description can take the necessary steps to compel the trustee to do his duty, although possibly the trustee may distribute among other members of the class. The general rule is that the class must not be of such a size or such a character that there will be any undue difficulty in ascertaining who are entitled to take. If there is any difficulty in such ascertainment, the gift is impracticable.¹⁰ Where, however, the objects are charitable, the court will ignore the practical difficulties and direct the disposition

⁷ It was first decided in the *Methodist Church v. Remington*, 1 Watts, 218 (1832), that the society could not take when some of the members resided outside the state. This was overruled in the *Evangelical Ass'n's. App.*, 35 Pa. 316 (1860), and the result of that decision embodied in the proviso to §5 of the Act of April 26, 1855 P. L. 328, quoted in the text.

⁸ An exception of form rather than of

substance: Gray, 15 Harv. Law Rev. (1902) p. 515.

⁹ See §720, ante.

¹⁰ An extreme case of an impracticable gift would be this: to all negroes now living in Africa under forty years of age, who weigh over 125 lbs. Such gifts are extremely rare, and do not call for any further discussion. See also §339, ante, as to lives in being, and §69, ante, as to remainders to a class.

of the fund under the doctrine of *cy pres*.¹ Where the objects are non-personal, there is, in truth, no one who can proceed to compel the trustee to perform his duty. No very clear principle can be laid down as to this class of trusts; and they have been sustained generally on the ground that the objects are charitable, although in some cases the strain on the notion of a charity is pretty severe.² It may be said that the rules we have been discussing which restrict the exercise of the power of dominion, only apply to gifts to natural or artificial persons, and that a gift at law to a non-personal object is void. Where there is a gift in trust for such an object the chancellor will control the execution of the trust upon principles of practical expediency. If the objects are such that the property can be immediately applied in a way that is not injurious to the community, the trustee will be permitted to proceed.³ If the objects are such that the property must be applied at a distant time in the future and it cannot now be said that the property can ever be so applied with any practical usefulness, the chancellor will decree a resulting trust. The property cannot be tied up to provide for a visionary scheme of the donor.

Application of the Rule Forbidding Restraints on Alienation to Gifts to Indefinite Charitable Objects

725. Where there is a gift to an indefinite charitable class, whether in trust or at law, the interest of the charity is inalienable, as there is no one who can alienate⁴ or, more accurately speaking, the members of the class are so numerous and fluctuating that it would be practically impossible to get them all to join in a conveyance. In the case of a trust the legal title is alienable, and a provision prohibiting alienation attached thereto would, it is apprehended, be void.⁵ Where the objects are non-personal the interest is in like manner inalienable, and in this case it may be said that the object

¹ See §764, post.

² For examples of this kind of a trust, see *Smith v. Townsend*, 32 Pa. 434 (1859), where there was a trust to repair, build and rebuild an almshouse; for a collection of the cases, see article of Mr. Gray, *Gifts for Non-charitable Purposes*, 15

Harv. Law Rev. 509 (1902).

³ Thus, in the case of a gift to build a college, repair a grave, plant and renew shade trees.

⁴ Gray, *Rule Perp.*, 2 ed. (1906), §600.

⁵ See §758, post, as to sales of trust property.

cannot alienate. A shade tree or a grave is, according to common law notions, incapable of performing the act of alienation.

Application of the Rule Against Perpetuities to Gifts to Indefinite Charitable Objects

726. Where there is a present gift to the members of an indefinite class, the objects of which are charitable, the circumstance that some of the donees will take a benefit at a remote period will not invalidate the gift,⁶ although if the objects were not charitable, the rule against perpetuities would apply, and the whole gift would be void. The wishes of a donor cannot be carried out unless a number of the members of the class take in violation of the rule. Thus, a trust to use the income to feed the poor of the city of Philadelphia during the next one hundred years necessarily involves the consequence that some poor people will be fed at a period beyond that prescribed by the rule.⁷ Where, however, all the members of the class take at a remote period, as where there is a gift to the whole class upon a remote contingency, the rule applies, and the gift is void, even though the objects are charitable.⁸ So also a direction to accumulate, and a contingent gift of the accumulated fund at a remote period is within the rule.⁹ A gift to a class may be impracticable and yet valid, so far as the rule against perpetuities is concerned,¹⁰ and may be practicable and yet violate the rule against perpetuities,¹¹ and

⁶ See *Yard's App.*, 64 Pa. 95, see item 3 of will on p. 96 (1870); *Gray*, *Rule Perp.*, 2 ed. (1906), §603b.

⁷ *Mr. Graysays*, *Rule Perp.*, 2 ed. (1906), §596, that the class is treated as an entity, and, therefore, subject to a condition precedent, and, consequently, in such case, the rule should apply. The objections to the entity theory have already been pointed out; see §69; and also §723, ante. It might be argued from this point of view that the rule should not apply in either case, because if some members of the class may take at a remote period, there is no reason why they should not all take. The exception, however, is not logical, but arises from practical necessity, and as the impulse of the community to give

to charity is allowed free scope, without sustaining the gift to indefinite charitable objects on a remote contingency, the rule is applied. As *Mr. Gray* observes, *ubi supra*, §591, this exemption from the operation of the rule against perpetuities is not involved in the conception of a charitable object.

⁸ *Gray*, *Rule Perp.*, 2 ed. (1906), §§594-596; *Hillyard v. Miller*, 10 Pa. 326 (1849); *Smith v. Townsend*, 32 Pa. 434 (1859), *semble*.

⁹ For a discussion of this, see §§653-657, ante.

¹⁰ As in the case of a gift to all negroes now living in Africa over forty years of age.

¹¹ As in the case of a gift to all the great-grandchildren of A.

it may violate both rules.¹² And in all these cases if the objects are charitable the gift will be valid.

Application of the Rule Forbidding Restraints on Enjoyment to Gifts to Indefinite Charitable Objects

727. The rule forbidding the imposition of restraints on enjoyment does not apply to the case of a gift to an indefinite charitable class. Each member of the class is restrained in his enjoyment of the fund by the rights of all the other indefinite members of the class and no one member has an absolute right to the whole of the property.

Definite Charitable Objects Defined

728. The only case of a definite charitable object is that of a charitable corporation. Since charitable corporations may be incorporated under the law of Pennsylvania, and as most modern charities are carried on under corporate organization, cases of indefinite charitable objects are becoming less frequent.¹ We shall now consider the application of the rules against perpetuities, etc., to a gift to a definite charitable corporation.²

Application of the Rule Forbidding Restraints on Alienation to a Gift to a Definite Charitable Object

729. A trust for a definite charitable object is probably inalienable as to the equitable interest, even though there is some one who can alienate.³ No case appears to have arisen on this point. The nature of the interest seems to forbid the idea of alienation. Where, however, there is a direct gift at law and the legal title to the property is vested in the charitable corporation it can undoubtedly alienate just like any other corporation.⁴

¹² As in the case of a gift to the great-grandchildren of the twelve oldest persons living in Philadelphia on the first day of January, 1909.

¹ For a further discussion of the case of a charitable corporation, see §§782-785, post.

² Mr. Gray, *Rule Perp.*, 2 ed. (1906), Appendix A. §680 et seq., collects a

number of instances of definite charitable objects, and concludes that such gifts are valid.

³ Gray, *Rule Perp.*, 2 ed. (1906), §600.

⁴ See *Appeal of St. Luke's Church*, 1 Walker, 283 (1863), where there was a gift to a charitable corporation with a gift over on voluntary alienation, which was held void as being remote.

*Application of the Rule Against Perpetuities to a Gift to a
Definite Charitable Object*

730. There is no occasion to violate the rule against perpetuities in order to carry out a gift to a definite charitable object. The application of the rule to such charitable gifts will not be unduly restrictive, as the period prescribed by the rule affords ample scope for the gratification of the charitable inclinations of the community. In the case, therefore, of a gift to a definite charity, the rule applies, whether the gift is over after a gift to another charity, or after a gift to an individual or upon any other contingency.⁵ A gift to a class may be definite where the class indicated is of such a nature that one particular person can be pointed out as the sole recipient of the gift.⁶

*Application of the Rule Forbidding Restraints on Enjoyment to
Gifts to a Definite Charitable Object*

731. When the gift is in trust for a definite charitable object there is a restraint on enjoyment, as the cestui que trust cannot obtain the legal title. Such a restraint, however, is necessary to the continuance of the trust and inseparable from its nature, and there is no reason why the exception to the rule should not be permitted, as the principle of public policy, as has been already pointed out,⁷ does not touch dispositions for charitable objects. Where the gift is at law the charitable corporation is restrained by the provisions of its charter in the use which it may make of the property.

*Mr. Gray's Observations on the Application of the Rule Against
Perpetuities to Gifts to Charitable Objects*

732. It may be added that the distinctions which have just been made as to the application of the rules against perpetuities, etc., between definite and indefinite charitable objects, are, so far as the author is aware, entirely novel. Mr. Gray

⁵ Gray, *Rule Perp.*, 2 ed. (1906), §593; *Appeal of St. Luke's Church*, 1 Walk. 283 (1863). For an instance of such a remote gift, as to which no question was raised, see *Goddard's Est.*, 198 Pa. 454 (1901).

⁶ Gray, *Rule Perp.*, 2 ed. (1906), §685.

Thus, suppose a gift to such one of my brothers' or sisters' children as shall come from Ireland first upon receiving a certain notice: *Chambers v. Wilson*, 2 Watts, 495, (1834), stated §347, ante.

⁷ See §13, ante.

makes no such distinctions. The conclusions which he reaches are, however, entirely in harmony with those which have been indicated. Mr. Gray observes⁸ that the question of remoteness may present itself in connection with charitable trusts in three shapes: a gift to a charity may be followed by a remote gift to an individual; a gift to an individual may be followed by a remote gift to a charity; and a gift to a charity may be followed by a remote gift to another charity; and in each of these cases the gift over may be direct or in trust. He concedes that the rule applies in the first two cases and the gift over is void and that the third case is doubtful.

Gift to a Charity Upon a Remote Contingency After a Gift to Another Charity

733. A gift to a charity upon a remote contingency after a gift to another charity, is of doubtful validity. Mr. Gray⁹ submits that the gift is void and within the rule against perpetuities, on the ground that although property given for a charity is, in its nature, inalienable, yet it does not follow that it can begin on a remote contingency, and that the decision in *Christ's Hospital v. Grainger*,¹⁰ that such a gift was good, proceeds upon a confusion in thought between a gift violating the rule against perpetuities and a gift that is inalienable, and he adds that the rule is only aimed at the destruction of remote future interests, and consequently the question of alienability is of no moment.¹ He further observes that the rule against perpetuities is founded upon public policy, aimed at increasing the energy and interest with which property would be used, by preventing the danger of its being lost upon a future contingency, and that that consideration applies equally well to a gift to a charity, for which further considerations he urges that the limitation over is within the rule against perpetuities. Upon this, it is to be observed, that the consideration of energy and interest is not of the same force where the intervening estate is in a charity as when it is in an individual. Further objections to this suggestion have already been pointed out.² It is apprehended that

⁸ Rule Perp., 2 ed. (1906), §592.

¹ Rule Perp., 2 ed. (1906), §§603a-603h.

⁹ Rule Perp., 2 ed. (1906), §§599-600.

See §§332, 333, ante.

¹⁰ 16 Sim. 83, 1 Macn. & G. 460, 1 H. &

² See §14, ante.

Tw. 533 (1849).

the gift over is void because there is no necessity for an exception to the rule against perpetuities in this particular. There is ample opportunity for all necessary charitable gifts without allowing a gift to either definite or indefinite charitable objects to begin upon a remote contingency.³ It is, however, not clear whether the rule against perpetuities in Pennsylvania applies to a gift to a charity upon a remote contingency after a gift to another charity. The question was raised in Franklin's Estate,⁴ in which Mr. Gray appeared as counsel. Unfortunately, the view which the court took of the case rendered it "unnecessary to consider the other questions which were argued with great ability and learning by the counsel of the respective parties."⁵ There is a dictum by Penrose, J., in Lennig's Estate,⁶ that the gift over is valid. The learned judge took the position that the question was closed in Pennsylvania by the provisions of the Act of May 9, 1889,⁷ which, "in most unequivocal terms," he said, "declares that a gift to a charity shall not fail because transgressive of the rule against perpetuities." There is room to doubt whether the terms of the act "by reason of being given in perpetuity" are so broad. The words in their most natural meaning seem to apply to a perpetual trust or gift, and not to a remote contingency. The point is therefore open on the authorities, and it is impossible to say what the law is. It is apprehended, however, that reason and the weight of authority are against the validity of the gift.

Summary of the Law as to the Exceptional Nature of a Gift to a Charity

734. It is clear, therefore, that some gifts to indefinite objects are sustained as against the operation of the rule against perpetuities⁸ when the objects are charitable, and that all such gifts are exceptions to the rule forbidding restraints on alienation⁹ and to the rule forbidding restraints on enjoy-

³ See Gray, Remoteness of Charitable Gifts, 7 Harv. Law Rev. 406 (1894); Remoteness of Charitable Gifts Once More, 8 Harv. Law Rev. 211 (1894), by R. Mason Lisle.

⁴ 150 Pa. 437 (1892).

⁵ Per Heydrick, J., 150 Pa. at p. 450; see also the same case in 13 Pa. C. C. 241 (1892). For a vigorous and somewhat caustic criticism of the view which the

court did take of the case, see note in 6 Harv. Law Rev. 202 (1893). See also §653, n. 9, ante, for a discussion of the point in the case.

⁶ 154 Pa. 209 at 216 (1893).

⁷ P. L. 173, see Act of May 23, 1895, P. L. 114.

⁸ See §726, ante.

⁹ See §725, ante.

ment,¹⁰ and that gifts to definite charitable objects are allowed by way of exception to the rule forbidding restraints on alienation,¹¹ and to the rule forbidding restraints on enjoyment,¹² but are not exceptions to the rule against perpetuities.¹³ The statement commonly made that a gift to a charity is an exception to the rule against perpetuities must therefore be taken with considerable qualification.¹⁴

Acts of 1855 and 1895

735. There are several statutes in Pennsylvania relating to charities, some of which being of limited application, are noticed at the proper place. There are some provisions, however, which are of such general operation, that they should be referred to at this point. The Act of May 23, 1895,¹ provides as follows: "That no disposition of property heretofore or hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain or ceasing, or depending upon the discretion of a last trustee, or being given in perpetuity or in excess of the annual value hereinbefore limited, but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity; for which purpose the proceeding shall be instituted by leave of the attorney-general of the commonwealth, on the relation of any institution, association, corporation not for profit, or individual, desirous of carrying such disposition into effect, and

¹⁰ See §727, ante.

¹¹ See §729, ante.

¹² See §731, ante.

¹³ See §730, ante.

¹⁴ Gray, *Rule Perp.*, 2 ed. (1906), §589.

¹ P. L. 114. The Act of 1895 re-enacts §10 of the Act of April 26, 1855, P. L. 328, without any change, except the addition of the words "corporation not for profit," in the list of persons who may institute proceedings under the act; see Landis, J., in the court below, in *Stevens's Est.*, 200 Pa. 318 at 322 (1901), and renders obsolete the conflicting and ambiguous Acts

of July 7, 1885, P. L. 259, and May 7, 1889, P. L. 173, as to which see dictum of Penrose, J., in *Alter's Est.*, 4 Pa. C. C. 558 at 560 (1887), and remarks of the court below in *Trim's Est.*, 168 Pa. 395 at 397 (1895). The Act of 1895 seems to have been overlooked in the following cases: *Young v. Church*, 200 Pa. 332 (1901); *Houston's Est.*, 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Montg. 151; *Harman v. Romberger*, 34 Pa. C. C. 593 (1908); and by the learned editors of *Pepper & Lewis's Digest of Decisions*, title "Charities," Vol. II, and Vol. I C. R. A. col. 869.

willing to become responsible for the costs thereof, subject to an appeal as in other cases in said courts respectively, and to be reviewed, reversed, affirmed, or modified by the Supreme Court of this state; but if the objects of the trust be not ascertainable, or have ceased to exist, or such disposition be in excess of the annual value permitted by law, or in perpetuity, such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the legislature of this commonwealth, in manner as nearly in conformity with the intent of the donor or testator, and the rules of law against perpetuities as practicable; or otherwise, to accrue to the public treasury for the public use." The tenth section of the Act of 1855 was prospective.² It seems that the same construction should be given to the Act of 1895. This legislation will be noticed again at various points in the discussion.

Statute of Frauds

736. A gift to a charity is not an exception to the provisions of the statute of frauds.³ Where, however, there is a parol declaration of trust upon the faith of which the promisee has acted to his detriment, the promisor is not permitted to avail himself of the statute of frauds because he would then be unjustly enriched, and of course his enrichment is the same whether the objects are charitable or otherwise.⁴

Charitable Gifts Must be Made Within One Month of the Death of the Donor

737. All charitable gifts of real or personal estate made by will or deed are subject to the provisions of the Act of April

² Sharswood, J., in *Mann v. Mullin*, 84 Pa. 297 at 301 (1877); *Houston's Est.*, 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Montg. 151; *App. of Children's Hosp.*, 10 W. N. C. 313 (1881); see on the act generally, *Taylor v. Mitchell*, 57 Pa. 209 (1868).

³ Act, March 21, 1772, 1 Sm. L. 389, §1; Act, April 22, 1856, P. L. 532, §4.

⁴ A parol promise to dedicate certain lands in trust for a charitable purpose was not within the statute of frauds, when

the promise had been acted upon by the construction of improvements for the use of the charity; *Martin v. McCord*, 5 Watts, 493 (1836); *Beaver v. Filson*, 8 Pa. 327 (1848); *McLain v. School Directors*, 51 Pa. 196 (1865). Read in this connection the dissenting opinion of *Mestresat, J.*, in *Flood v. Ryan*, 220 Pa. 450 (1908), where the learned judge understands the facts in that case as constituting such a promise.

26, 1855,⁵ which provides, in effect, that every disposition in trust for a religious or charitable use must be by a deed or a will, attested by two credible and disinterested witnesses, at least one calendar month before the decease of the testator or alienor. The act seems to apply only to a gift to a body politic or to an individual in trust. This distinction does not seem to have been taken in practice, and it is probable that the act has been applied to all gifts at law as well as in trust.⁶ A detailed consideration of the provisions of this act lies outside the scope of this treatise.

Exemption From Taxation

738. The Constitution of Pennsylvania⁷ provides that the General Assembly may exempt from taxation certain classes of charities. The legislature has, in pursuance of this clause, exempted the charities mentioned in the constitution from taxation. The question of what is or what is not a charity has been frequently raised in the endeavor to bring the gift within these provisions.⁸ This point does not concern us here, however, and will not be further discussed.

Preliminary Discussion of a Charitable Trust

739. Where a gift is in trust for a charity, there is a charitable trust which differs from other trusts only as respects the character of the cestui que trust. The jurisdiction of the chancellor over charitable trusts was formerly supposed to

⁵ §11, P. L. 328. The provisions of the act are as follows: "§11. That no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary thereto, shall be void and go to the residuary legatee or devisee next of kin, or heirs, according to law; provided, That any disposition of property within said period, bona fide made for a fair

valuable consideration, shall not be hereby voided."

⁶ The best discussion of this act in the books will be found in an anonymous article entitled *Gifts to Charities*, in *The Forum*, Vol. XII, p. 167 (1908).

⁷ Art. IX, §1.

⁸ For a few of the recent cases, see *Orphan Asylum v. School District*, 90 Pa. 21 (1879); *Phila. v. Woman's Christian Assn.*, 125 Pa. 572 (1889); *Episcopal Acad. v. Phila.* 150 Pa. 565 (1892); *Harrisburg v. Harrisburg Acad.*, 26 Super. Ct. 252 (1904); *Mattern v. Canevin*, 213 Pa. 588 (1906).

depend upon the Statute of 43 Elizabeth. That notion has been completely exploded, and it is now clear that the chancellor exercised this jurisdiction before the statute was passed.⁹ Such jurisdiction is inherent in the court, and is not an instance of any separate or extraordinary jurisdiction,¹⁰ and exists in Pennsylvania independently of statute.¹ The only peculiarity in the exercise of this jurisdiction, if indeed it is peculiar, lies in the fact that since the objects are indefinite, the court cannot be so exact in saying what is a proper application and what is not.² The principles governing the case of a trust for non-personal objects have already been pointed out.³ It has been said that a charitable trust can only arise from a gift; that where the trust is the result of a contract the objects will not be considered charitable.⁴ This statement requires explanation. If A. buys land from B., and the land is conveyed upon certain trusts, it is true that B. cannot be said to be the donor of a charitable trust. But A., who furnished the consideration, is really the donor and the case is the same as if the land were conveyed to him absolutely, and then he in turn executed a deed declaring the trust.⁵ Furthermore, a charity may admittedly be created by the mutual promises of several agreeing together to furnish the funds,⁶ and nevertheless will be a gift, the contractual element having no bearing on the gift itself.

⁹ See argument of Mr. Binney in *Vidal v. Girard's Executors*, 2 Howard 127, (1844); *Perry, Trusts*, Vol. 2, §§692-695, 5 ed. (1899), and authorities cited.

¹⁰ *Perry, Trusts*, 5 ed. (1899), Vol. 2, §717.

¹ Gibson, C. J., in *Witman v. Lex*, 17 S. & R. 88 at 92 (1827); Sergeant, J., in *Martin v. McCord*, 5 Watts, 493 (1836); *Pulpress v. Church*, 48 Pa. 204 (1864); *Fisher's App.*, 162 Pa. 232 (1894). "Equitable powers in support of charitable uses seem to be founded rather in necessity and the constitution of the court, than in the provisions of the 43rd Elizabeth, which are not in force here." Gibson, C. J., in *Methodist Church v. Remington*, 1 Watts, 219 at 225 (1832).

² Thus, if the trust is to pay to A., a payment to anyone else than A. is clearly

bad; but if the trust is to feed the poor old men of the city of Philadelphia, there must be some selection made unless the fund is sufficient to feed all the poor old men, and when a selection has been made, the court cannot say that the trustee has misapplied because he has selected this poor old man instead of that poor old man, so long as the person selected is a poor old man of the city of Philadelphia.

³ See §724, ante.

⁴ Bispham, *Equity*, 7th ed. (1905), p. 194, citing *Brendle v. The Congregation*, 33 Pa. 415 (1859). Hill, *Trustees*, Bispham's ed. (1867) p. 707.

⁵ For such a case see *Seebold v. Shitler*, 34 Pa. 133 (1859); see dictum in *Kerlin v. Campbell*, 15 Pa. 500 at 506 (1850).

⁶ Hill, *Trustees*, Bispham's ed. (1867), p. 708; *Morrison v. Beirer*, 2 W. & S. 81 (1841).

Statute of 43 Elizabeth in Pennsylvania

740. The Statute of 43 Elizabeth is not in force in Pennsylvania, and it appears from the abstract given by Boyle⁸ that the provisions of the act relate entirely to the administration and reformation of charitable foundations. It is clear, therefore, that nothing in the act has any bearing on the validity of a charitable trust as an exception to the three rules of law under discussion.⁹ And as a charitable trust differs from other trusts only in so far as it is an exception to these rules, it is apprehended that the remarks frequently found in the books in Pennsylvania, where the court is considering the validity of the charitable trust, that the statute has been assumed as part of the common law,¹⁰ are not only inconsistent with the report of the judges that the statute is not in force, but totally unnecessary so far as the validity of a trust for a charity in Pennsylvania is concerned.

As to Perpetuity of a Charitable Trust

741. In so far as a trust for charitable objects is an exception to the rule against perpetuities, the rule forbidding the creation of restraints on alienation, and the rule forbidding the imposition of restraints on enjoyment, it may be said to be perpetual. It would be more accurate to say that it is indefinite in duration. Strictly speaking, it can never be known whether it will last forever. That part, therefore, of the Act of 1895¹ which provides that a charitable trust shall not fail by reason of being given in perpetuity, is merely declaratory of the existing law. Although the trust for a charity may be perpetual, it is not necessarily so.² The donor may provide for a payment of income to a charitable object for a specified time only, and

⁷ Report of the judges, 3 Binney, 595 at 621 (1808).

⁸ See Perry, *Trusts*, 5 ed. (1899), Vol. 1, §692, n. 2.

⁹ The rule against perpetuities, the rule forbidding the creation of restraints on alienation, and the rule forbidding the imposition of restraints on enjoyment.

¹⁰ Gibson, C. J., in *Pickering v. Shotwell*, 10 Pa. 23 at 26 (1848); Sergeant, J., in *Zimmerman v. Anders*, 6 W. & S.

218 at 221 (1843); Lewis, C. J., in *Price v. Maxwell*, 28 Pa. 23 at 35 (1857); Hill on *Trustees*, Bispham's Ed., (1867), 704, note. See the more accurate statements of Gibson, C. J., in *Witman v. Lex*, 17 S. & R. 88 at 91 (1827), and Mitchell, C. J., in *Dulle's Est.*, 218 Pa. 162 (1907).

¹ P. L. 114, re-enacting §10 of the Act of April 26, 1855.

² See language of Bell, J., in *Wright v. Linn*, 9 Pa. 433 at 436 (1848).

the length of time that the income is to be paid to the charity is to be determined from the provisions of the settlement.³

Non-User and Diversion

742. Where the trust is indefinite, a non-user is merely a temporary maladministration of the trust, and the court, on its attention being called to the matter, will make the proper directions as to the disposition of the fund; and no advantage thereof can be taken by the donor or his heirs, as the non-user does not exist in contemplation of law. A trust for a charity, therefore, is not defeated by non-user or diversion.⁴ The question of what is diversion lies very near to the question of what is the proper exercise of discretion. Where the non-user or diversion is because the application cannot be made to the original objects, the case will come under the doctrine of *cy pres*⁵ or else the chancellor will decree a resulting trust. Where the trust is for a public purpose, and there is a subsequent change in the framework of the government, it is often an extremely difficult matter to determine the proper application of the fund.⁶

Not Necessary to Name a Trustee in Creating a Charitable Trust

743. There is no more necessity of naming a trustee in creating a charitable trust than in the case of any other trust. The maxim that equity will not allow a trust to fail for want of a trustee is of equal application here, and the appointment of a trustee in such case is an exercise of the ordinary jurisdiction of a court of equity.⁷ A controversy may arise as to

³ Thus, a gift of a certain sum for the poor of a certain congregation annually for ten years: *Witman v. Lex*, 17 S. & R. 88 (1827). The limitation in *Young v. Church*, 200 Pa. 332 (1901), probably presented such a case. This point, however, was not involved in the discussion; see this case stated, §655, ante.

⁴ *Wright v. Linn*, 9 Pa. 433 (1848); *Kerlin v. Campbell*, 15 Pa. 500 (1850).

⁵ Discussed §§762-781, post.

⁶ See *Stallman's App.*, 38 Pa. 200 (1861); *Brookville Boro. v. Startzell*, 207 Pa. 347 (1901); Act March 5, 1903, P.

L. 9; §790, post, on trusts for school-houses.

⁷ *Perry, Trusts*, 2 ed. (1889), Vol. 2, §722. So much of the Act of April 26, 1855, §10, P. L. 328, re-enacted by Act of May 23, 1895, P. L. 114, see §735, ante, as provides that no disposition of property for a charitable use shall fail for want of a trustee, but it shall be the duty of the court having jurisdiction to supply one, is merely declaratory of the existing law. See *County of Lawrence v. Leonard*, 83 Pa. 206 (1876); *Trim's Est.*, 168 Pa. 395 (1895). Where no trustee of a fund for

who is the trustee under the terms of the will which, however, is purely a question of construction.⁸ The paragraph in the syllabus to the case of *Pickering v. Shotwell*,⁹ which is as follows: "Though the objects of a charity are uncertain, a devise will not fail for want of a trustee capable of taking, if the discretionary power of selection is vested anywhere," is probably erroneous. In the first part of his opinion in that case Mr. Chief Justice Gibson said that a charitable use would not fail for want of a trustee, which is clearly the law but entirely unnecessary to the decision of the case, as there was a trustee mentioned and capable of taking. In the latter part of his opinion he said that whenever a general or vague purpose was disclosed, the English chancellor would uphold the bequest but apply the fund to a charity of the same kind or as near thereto as could be ascertained (probably meaning the doctrine of *cy pres*) and then said: "the worst that could befall such a bequest as this in his court would be an arbitrary disposition of the fund, which we have never attempted, but we certainly will not let a charitable bequest fail where there is a discretion or an option given to the trustee, and if he cannot apply it to all the contemplated objects, it will be sufficient if he can apply it to any of them." The reporter patched these remarks together and produced the remarkable statement of the law in the syllabus, from which the only inference that can be drawn is that equity will not appoint a trustee where none is named unless there is a discretionary power of selection vested in the trustee.

a public schoolhouse is appointed, the management will fall on the school directors under the common school law; *Klinkener v. School Directors*, 11 Pa. 444 (1849); *Pott v. School Directors*, 42 Pa. 132 (1862). The dictum of Sharswood, J., in *Zeisweiss v. James*, 63 Pa. 465 at 469 (1870), embodied in paragraph 9 of the syllabus, that "Where there is no competent trustee named or he dies or resigns and no provision is made by the testator for the continuance of the trust, the charity must fail," is hardly accurate, since a court of equity will appoint a trustee whenever necessary whether one is named or not. For a discussion of the application of the statute of uses to a trust

for a charity, see §130, ante.

⁸ See *Long's Est.*, 204 Pa. 60 (1902).

⁹ 10 Pa. 23 (1848). In this case there was a devise to the Monthly Meeting of Friends of Philadelphia, to be applied for the distribution of books, etc. The trust was attacked by the residuary legatees on the ground that the devise was void for want of certainty, and that the Monthly Meeting was unable by law to take as trustee. The court held, in an opinion by Gibson, C. J., that the gift would be sustained notwithstanding the uncertainty as to the trustee, that the trust was not open to any objection on the ground of uncertainty, being a trust for a charity.]

Preliminary Discussion of Discretion in the Trustee

744. The principles regulating the subject of discretion in the trustee of a charitable trust are the same as those applicable to an ordinary trust save in the case where there is an exception to the rule against perpetuities or the rule forbidding restraints on alienation or enjoyment.¹⁰ The law, however, has been thought to be peculiar in some other respects in the case where there is a trust for a charity, and it has, therefore, been found necessary to discuss the cases at some length. The attention of the learned reader will be directed solely to discretion in connection with the equitable estate, and the discussion will be distributed under the classification of inherent discretion and express discretion which has been previously adopted.

Preliminary Discussion of Inherent Discretion

745. The discretion inherent in a trustee has already been discussed.¹ This so-called discretion is really nothing more than the exercise of the powers he possesses as legal owner, in obedience to the duty cast upon him by the terms of the trust. The trustee's discretion is, in fact, larger in the case of a trust for indefinite charitable objects than in any ordinary trust, but is none the less inherent. Thus, in the case of a trust for the poor, the trustee is under greater necessity for the exercise of his judgment than in the case of a trust for the grandchildren of the testator.² It is apprehended that it was this inherent discretion which Chief Justice Gibson had in mind in his remarks in *Witman v. Lex*.³ In that case the learned judge examined the question of the jurisdiction of the court in Pennsylvania in the case of a trust for a charity, and decided that the court had the necessary power to supervise the execution of charitable trusts, and that therefore such a system of trusts could be built up in Pennsylvania. He said that it is immaterial how uncertain the objects of the trust may be, provided there is a discretionary power vested anywhere⁴ over the application of the testator's bounty to those

¹⁰ See §734, ante, for the exceptions.

¹ See §§154, 158, ante.

² For cases of inherent discretion, see *Pulpress v. Church*, 48 Pa. 204 (1864); *Jacoby's Est.*, 34 Super. Ct. 355 (1907), case obscure and badly reported; *Soci-*

ety of the Cincinnati's App., 154 Pa. 621 (1893).

³ 17 S. & R. 88 at 92 (1827); this was the first case of a charitable trust in Pennsylvania.

⁴ The meaning of "anywhere" in this connection is somewhat vague.

objects. The learned judge probably had in mind the distinction between a gift at law to a charity, the administration of which would then have been beyond the power of the courts in Pennsylvania, and a gift in trust to a charity. This rather loose statement is perhaps to be expected in a jurisdiction where the distinction between law and equity was not clearly apprehended. The remark has been frequently quoted since, but seems to have been understood as meaning that there must be an express discretion vested in the trustee.⁵ It is not that there is a discretion reposed, but that there is a trust created. The creation of the trust necessarily creates the discretion.

The Acts of 1855 and 1895 Have no Effect on Inherent Discretion

746. This inherent discretion exists because of the existence of the trust, and can, therefore, be exercised by any trustee whether appointed or not. There is no particular personal confidence as is said to exist when there is an express discretion. The provisions, therefore, of the Act of May 26, 1895,⁶ providing that the trust shall not fail by reason of depending upon the discretion of the last trustee, seem to be intended to cover the case where an express discretion is conferred.⁷ In several cases arising before the Act of 1855 there was no express discretion vested in the trustee, and the trust was nevertheless sustained.⁸ The language, therefore, of Sharswood, J., in *Mann v. Mullin*,⁹ where he said that a discretion was necessary before the act, and that this provision of the act was intended to provide a remedy for the case where the settlor had omitted to vest such discretion in the trustee or trustees, may be disregarded unless understood as confined to

⁵ Rogers, J., in *Beaver v. Filson*, 8 Pa. 327 at 335 (1848); Strong, J., in *Domestic and Foreign Miss. Soc.'s App.*, 30 Pa. 425 at 435 (1858); Agnew, J., in *McLain v. School Directors*, 51 Pa. 196 at 199 (1865); Sharswood, J., in *Zeisweiss v. James*, 63 Pa. 465 at 468 (1870); Bittinger, J., in the court below in *Croxall's Est.*, 162 Pa. 579 at 581 (1894); Ashman, J., in *Kinike's Est.*, 155 Pa. 101 at 102 (1893); by the court below in *Murphy's Est.*, 184 Pa. 310 at 312 (1898); and by Mitchell, C. J., in *Dulles's Est.*, 218 Pa. 162

at 166 (1907)

⁶ P. L. 114; re-enacting §10 of the Act of April 26, 1855; see §735, ante.

⁷ As to which, see §748, et seq., post.

⁸ *Witman v. Lex*, 17 S. & R. 88 (1827); *Beaver v. Filson*, 8 Pa. 327 (1848); *Pickering v. Shotwell*, 10 Pa. 23 (1848); *Pulpress v. Church*, 48 Pa. 204 (1864); *McLain v. School Directors*, 51 Pa. 196 (1865); *Zeisweiss v. James*, 63 Pa. 465 (1870); *County of Lawrence v. Leonard* 83 Pa. 206 (1876).

⁹ 84 Pa. 297 at 300 (1877).

inherent discretion. The remarks of the same judge in *Zeisweiss v. James*¹⁰ are open to a similar objection.

Preliminary Discussion of Express Discretion

747. Express discretion is where the doing of some act with respect to the trust is expressly left to the personal judgment of the trustee, and may be of two kinds: (1) where there is a specific designation of charitable objects, and an express discretion reposed in the trustee as to the method of carrying out the trust; (2) where no specific objects are designated at all but the trustee has discretion as to the objects to which the trust property is to be applied and there is a general charitable purpose disclosed.

Express Discretion as to Application to Specifically Designated Charitable Objects

748. An express discretion as to application to specifically designated charitable objects may arise when the trustee is authorized or directed to apply the fund to one or the other of two classes of objects,¹¹ and in such case the discretion is absolute and the trustee is the sole judge of its exercise. Many cases of so-called express discretion are merely directions as to the minor details or method of carrying out the trust, and may in fact limit the trustee's power instead of enlarging it. A striking example of this is furnished in the case of *Williams's Appeal*.¹ The testator wished to erect a library in Philadelphia and provided that his trustee should have discretion as to the place of erecting the library building.² If the trust had been merely to found a library in Philadelphia, nobody would have doubted that the trustee would have had power and discretion to select the lot, and the controversy in the case would probably not have arisen.³ The trustee may also have discretion vested in him to make the application if

¹⁰ 63 Pa. 465 at 468 (1870); see these remarks quoted §743, n. 7, ante.

¹¹ Thus, for distribution of books or for the support of a free school: *Pickering v. Shotwell*, 10 Pa. 23 (1848).

¹ 73 Pa. 249 (1873); see also *Elkin's Est.*, 30 Pa. C. C. 49 (1904), s. c. 13 D. R. 211; even without the elaborate provisions in the will in this case the court

would have had no power to control the discretion except in the case of fraud or abuse.

² See p. 254.

³ For other cases of such discretion, see *Ingle's Est.*, 76 Pa. 430 (1874); *Bainbridge's App.*, 97 Pa. 482 (1881); *Lewis's Est.*, 152 Pa. 477 (1893); *Society of the Cincinnati's App.*, 154 Pa. 621 (1893).

certain extrinsic facts exist. In these cases, upon proof of the facts, the trustee will be compelled to make the application.⁴ This is a case of legal discretion as to application to charitable objects.⁵

Preliminary Discussion of Express Discretion Where no Objects are Designated but a Charitable Intent Disclosed

749. The fundamental idea in a trust is that the trustee is under a duty, which duty must be particularly specified. Now, if a trust is created so that it is clear that the trustee is under a duty and no objects are designated, the law says that as the donor did not intend the trustee to take beneficially, there must be a resulting trust to the heir at law or next of kin; and since there are no objects specified, the court cannot undertake to select a cestui que trust or permit the trustee to make selection for himself. Now, suppose the trustee has discretion as to the duty he has to perform; that is, the donor leaves it to him personally to select the cestui que trust. If the discretion may be exercised so as to create limitations violating the rule against perpetuities, the case should be the same as if the remote limitations had been made by the donor, and there would be a resulting trust accordingly.⁶ Suppose, however, the discretion must be exercised within the period prescribed by the rule against perpetuities, and the trustee has exercised the discretion and made appointments which are within the rule. Can the persons designated take the trust property as against the heir at law or next of kin? Can the trustee in such a case by the exercise of the discretion prevent a resulting trust? Suppose he does not exercise the discretion. The question which arises then is this: can he be compelled to make a selection of beneficiaries, and if so, how can a decree be made against him? If he cannot be compelled to exercise the discretion, what disposition is to be made of the trust property? In the case of *Morice v. The Bishop of Durham*⁷ property was bequeathed to the Bishop upon trust to dispose of the ultimate residue to such objects of benevolence and morality as the Bishop of Durham in his

⁴ *Fidelity Ins. Co.'s App.*, 99 Pa. 443 (1882); *Seagrave's App.*, 125 Pa. 362 (1889).

⁵ For a definition of legal discretion, see §531, ante.

⁶ For a discussion of the application of the rule against perpetuities, see §§411-413, ante.

⁷ 10 Vesey, 521 (1805).

own discretion should most approve of. The court decreed a resulting trust to the next of kin, although the Bishop was willing to exercise his discretion and make an appointment to proper objects. The opinion of the court proceeded upon the theory that since the objects designated were not charitable, the principle applied that in every trust there must be a definite cestui que trust, that since there was no such cestui que trust, the trust was void and there must be a resulting trust accordingly. This is the leading case on the subject, it has been generally followed in England and the United States, and has given rise to much learned discussion.⁸ Mr. Ames⁹ takes the ground that in *Morice v. The Bishop of Durham* the court should have permitted the Bishop to carry out the trust, as he was willing to do; that it was no more unjust to have enriched the Bishop at the expense of the next of kin, than to enrich testator's next of kin at the expense of the charity, there being no intention disclosed to benefit the next of kin; that therefore, in such case, as the trust was not contrary to law, its execution should be left to the voluntary action of the trustee, even though it could not be enforced were the trustee unwilling to perform; and that the next of kin could proceed if the trustee failed to make a proper application under the discretion. Mr. Gray¹⁰ takes the ground that the decision in *Morice v. The Bishop of Durham* was entirely consistent with legal principle, that the trust consisted of a revocable mandate, and the power of revocation became vested in the next of kin who were entitled to take the property away from the Bishop, even though he was willing to apply it to a charitable use. In the case where the trustee has discretion to appoint among the members of a class, as among the grandchildren of the testator, the law is plain that no grandchild can compel the exercise of the discretion in his favor, but that if the trustee refuses to exercise the discre-

⁸ There is a dictum of Gibson, C. J., without giving any reason, in *Witman v. Lex*, 17 S. & R. 88 at 93 (1827), that the decision in *Morice v. The Bishop of Durham* would not be followed in Pennsylvania. A case of such discretion was first presented in the Appeal of the Children's Hospital, 10 W. N. C. 313 (1881), but the case went off on another point.

The law has now been settled in Pennsylvania in accordance with the dictum of Chief Justice Gibson, by the cases next discussed, §§750-754, post.

⁹ The failure of the Tilden Trust, 5 Harv. Law Rev. 389-401 (1892).

¹⁰ Gifts for a Non-charitable Purpose, 15 Harv. Law Rev. 509 (1902).

tion, any one of the class entitled can proceed against the trustee, and the court will order an equal distribution among all. Now, if there are no *cestuis que trustent* specified, and the trustee has discretion, he can appoint to any one. The *cestuis que trustent*, therefore, are a class composed of all persons in the world and all possible objects. No one of them can proceed to compel the exercise of the discretion in his favor, but any one can proceed to compel the exercise of the discretion. If such application is made the court cannot direct an equal distribution among all the possible objects for several reasons: first, because the property of the trust will be insufficient to go around, and, secondly, because of the enormous practical difficulties in ascertaining who all the *cestuis que trustent* are, and in transmitting the property to them. The court, therefore, for practical reasons, cannot compel the exercise of the discretion in such a case. If, however, there is sufficient language in the trust to indicate a general charitable intent, and to restrict the class of objects to charities, the result will be different. If any charity should apply to the court to compel an exercise of the discretion, the court can direct the trustee to make a distribution, because under the doctrine of *cy pres*, it can, although the trust property would be insufficient to benefit all parties, and it would be impossible to ascertain all existing charities, make an order applying to certain designated charities. It may therefore be concluded upon principle that there is no valid objection in any case, whether the objects are specified as charitable or not, to the trustee actually exercising his discretion and making the appointment, subject to the rule against perpetuities. When it comes to compelling the exercise of the discretion, the court can make an order only in the case where the objects designated are charitable. If they are not charitable and the trustee fails to exercise the discretion, he has committed a breach of trust, and as he cannot take beneficially, there will be a resulting trust to the heir at law or next of kin.¹ If the trustee makes a valid exercise of the discretion, he will defeat the claim of the heir at law or next of kin. We shall now examine the Pennsylvania decisions relating to the case where there is an express discretion, with no specific objects designated, and a general charitable intent disclosed.

¹ See §151, ante, on resulting trusts.

McCurdy's Appeal

750. In *McCurdy's Appeal*² a testator bequeathed his residuary estate to his executors "to be devoted and given by them to such institutions or uses as they, in their best judgment, may consider the most compatible with the views and instructions which I have given them," expressly providing that none of his property should pass under the intestate laws. The executors exercised their discretion according to the instructions of the testator, and appropriated a portion of the residue to certain charities, and the balance to themselves. This was done in writing under seal, and after the death of one of the executors, the account of the other was filed. The validity of the appointment to the charity appears to have been admitted by all parties, although apparently sustained on the basis of the appointment being made in pursuance of the instructions from the testator. The controversy appears to have been between the executors and the next of kin over the attempted appropriation by the executors to themselves. It was held that the next of kin were entitled to the balance, notwithstanding the clause in the will. This was a clear case of a resulting trust. The language of Mitchell, J., where he said that the balance was not covered by the will, is open to serious objection.³

Kinike's Estate

751. In *Kinike's Estate*⁴ the testator gave the residue of his estate to his executors "to distribute the same among such charitable institutions and in such proportions as they, in their discretion, deem proper." The executors designated the charities, and the decree of the court awarding the residue to these charities, was sustained, Judge Ashman, in the court below, distinguishing the case from *Morice v. The Bishop of Durham*, on the ground that the volition of the trustees was expressly restrained to charitable institutions.⁵

² 124 Pa. 99 (1889).

³ At p. 114 of the report; see §151, ante, on resulting trusts.

⁴ 155 Pa. 101 (1893).

⁵ A similar result was reached in the following cases, where the discretion was confined to charitable objects: *Schlei-*

cher's Est., 201 Pa. 612 (1902); *DeSilver's Est.*, 32 Pa. C. C. 407 (1905); case obscurely reported in the county court report; for the terms of the will see report of the case on another branch in 211 Pa. 459 (1905); see *McCloskey's Est.*, 15 D. R. 428 (1906).

Murphy's Estate

752. In *Murphy's Estate*⁶ the testator directed as follows: "The balance of my estate, after the payment of the above legacies and the collateral inheritance tax on them, to be divided among such benevolent, charitable and religious institutions and associations as shall be selected by my executors or their successors." The surviving executor filed an account showing a distribution under the discretion to certain charities. Exceptions by the next of kin were dismissed. The action of the court below was affirmed, on appeal, without an opinion. The judge in the court below went on the ground that the word benevolent meant charitable.⁷ This case is in direct conflict with *Morice v. The Bishop of Durham*,⁸ and may be considered as overruling that case so far as the law in Pennsylvania is concerned.

Casey's Estate

753. In *Casey's Estate*⁹ the words of the trust were the same as in *Murphy's Estate*.¹⁰ The gift was to a Philadelphia trust company, in trust, to pay to a New York corporation, to be distributed by the corporation for such charitable, beneficial and religious purposes as the session of said church should from time to time order and direct. It seems as though, even if the trust were void, the proceedings should have been against the foreign corporation, which was the real trustee, that held upon the void trust. In so far as the Philadelphia trust company was concerned, the cestui que trust was a definite foreign charitable corporation, as to which there could be no question.

Dulles's Estate

754. In *Dulles's Estate*¹ the testatrix provided that in the events which happened her executors should have full power to distribute the residue of her estate among such religious, charitable and benevolent objects as they should think proper. The question came up on an appeal from the decree of the

⁶ 184 Pa. 310 (1898).

⁷ As to this point in the case see the discussion in *Perry, Trusts*, 5th ed. (1899), Vol. 2, §712, n. 2. The court did not observe that the estate could have been divided into three parts, and the gifts to charitable and religious held good,

and a resulting trust decreed as to the benevolent.

⁸ 10 Vesey, 521 (1805).

⁹ 28 Pa. C. C. 81 (1902), s. c. 12 D. R. 15.

¹⁰ 184 Pa. 310 (1898), stated §752, ante.

¹ 218 Pa. 162 (1907).

Orphans' Court on the executors' account. The case is badly reported, and it does not appear who the appellees were or what the adjudication of the court below was. It appears from the report of the case in the lower court² that the estate was awarded to the next of kin, and that the executors appealed from that decision, claiming to have the estate awarded to them under the terms of the trust. The Supreme Court reversed the Orphans' Court, and the estate was awarded to the executors. This case is on all fours with *Murphy's Estate*³ and would be well decided under the authority of that case without further discussion. Mitchell, C. J., in the Supreme Court, however, thought it necessary to go on and sustain the validity of the trust upon general grounds. It is to be observed that in this case the executors had made no appointment to the charities, and the decision, therefore, is authority for the proposition that where the objects designated are charitable, it is not necessary for the trustees to exercise the discretion in order to defeat the right of the next of kin. If, in such case, the trustees refused to exercise the discretion, the court could, under the *cy pres* doctrine, compel the application to proper charitable objects.

Pennsylvania Law as to Express Discretion where no Objects are Designated and there is a General Charitable Intent Disclosed

755. It may, therefore, be said, in view of these cases, that it is the law in Pennsylvania that where the trustee has exercised the discretion, the charitable objects which he has designated can take the property as against the next of kin or heir at law,⁴ and that if the trustees have completely exercised the discretion, and in the exercise have failed to dispose of all the trust property, there will be a resulting trust of that undisposed of residue;⁵ and that even if the trustees have failed to exercise the discretion where the objects designated are charitable, the court will refuse to decree a resulting trust.⁶ No Pennsylvania case has been found presenting the question of how far the trustee can exercise his discretion, where the objects are not confined to charities, and what disposition is

² 15 D. R. 518 (1906).

³ 184 Pa. 310 (1898), stated §752, ante.

⁴ *Murphy's Est.*, 184 Pa. 310 (1898); stated §752, ante.

⁵ *McCurdy's App.*, 124 Pa. 99 (1889), stated §750, ante.

⁶ *Dulles's Est.*, 218 Pa. 162 (1907), stated §754, ante.

to be made of the property in such case when the trustee fails to exercise his discretion. These two questions probably lie somewhat outside the scope of the present discussion. It may be remarked, however, that the reasoning of Mitchell, C. J., in *Dulles's Estate*,⁷ goes a long way towards sustaining the right of the trustee to exercise his discretion in such a case, and giving the next of kin a right to enforce a resulting trust only in the case where the trustee refuses to exercise his discretion,⁸ or in exercising it violates the rule against perpetuities.

As to Survival of Discretion

756. It was formerly the law that where the express discretion amounted to a personal confidence it could be exercised only by the trustee appointed in the settlement, and expired when he ceased to hold the office of trustee.⁹ Under this principle, it frequently happened that directions given by the testator could not be carried out, owing to the death of the trustee. This inconvenience has been remedied by the provisions of the Acts of 1855 and 1895,¹⁰ which provide that no disposition of property for any religious, charitable, literary or scientific use shall fail by reason of the objects depending upon the discretion of a last trustee. Accordingly, in several cases since the passage of the Act of 1855, the substituted trustee has been permitted to exercise the discretion.¹

Change of Trustees of a Charitable Trust

757. A court of equity has power to dismiss trustees and appoint new ones, and this power extends over the trustees of a charitable trust. The legislature, however, has no power under the constitution to summarily remove the trustees of a private charity. Such trustees are said to have vested rights in the management of the trust of which they cannot be deprived except by due process of law.² Where, however, the

⁷ 218 Pa. 162 (1907), stated §754, ante.

⁸ This is the same result reached by Mr. Ames in the article previously referred to in 5 Harv. Law Rev. 389-401 (1892).

⁹ Perry, *Trusts*, 5 ed. (1899), Vol. 2, §721; Hill, *Trustees*, Bispham's ed. (1867), p. 765; App., *Children's Hosp.*, 10 W. N. C. 313 (1881), see §158, ante.

¹⁰ See §735, ante.

¹ *Murphy's Est.*, 184 Pa. 310 (1898), stated §752, ante; *Stevens's Est.*, 200 Pa. 318 (1901); *DeSilver's Est.*, 211 Pa. 459 (1905), s. c. 32 Pa. C. C. 407 (1905), on another branch.

² *Brown v. Hummel*, 6 Pa. 86 (1847).

charity is for a public use, the legislature has power to direct a change of trustees.³

Sale of Property Held Under a Charitable Trust

758. The chancellor had the power to make a decree ordering a sale of the property or a change of investment.⁴ There are several cases in Pennsylvania in which such a sale was authorized, and they can be sustained only upon the principle of equity referred to, although in some of them the court sought to justify the decision by other reasons which will not bear examination.⁵ The case is now provided for by the Act of April 18, 1853,⁶ and the trustees of a charitable trust can easily dispose of the trust property under the provisions of the act.⁷ The proceeds of the sale, however, are to be held upon

³ For acts relating to public schools, see §790, post.

⁴ See authorities cited in Hill, Trustees, Bispham's ed. (1867), 720; Gray, Rule Perp., 2 ed. (1906), §590, n.; Perry on Trusts, 5 ed. (1899), Vol. 2, §737. "I do not doubt the existence of this power in the court; the trustees have the power to sell at law, they can convey the legal estate; and it is only a court of equity that can recall the property; and if that court should sanction a sale it would be bound to protect the purchaser." Sir James Wigram in Attorney-General v. Mayor of Newark, 1 Hare, 400; see Nauman v. Weidman, 182 Pa. 263 (1897).

⁵ Griffiths v. Cope, 17 Pa. 96 (1851); Barr v. Weld, 24 Pa. 84 (1854); Brendle v. Congregation, 33 Pa. 415 (1859); Seebold v. Shitler, 34 Pa. 133 (1859). In Saxton v. Mitchell, 78 Pa. 479 (1875), the testator who died in 1857 provided as to a certain tract of twenty acres of land, as follows: " * * * which I hereby reserve forever for the use of the members of the Methodist Episcopal Church to hold their camp-meetings on." An attempt was made to sell the land under the Act of 1853. The court held that the act did not apply, and a special act of the legislature was passed in 1871. The case came up on an application of the

parties authorized under the special act for the appointment of a trustee and an order of sale. The court held that this act was unconstitutional and dismissed the application, and said that the legal title to the lot of ground vested in the testator's heirs, subject to an easement in favor of the camp-meetings; that this was a perpetual right, and that the heirs could make any use of the ground they saw fit, so that it did not interfere with the camp-meeting. The court arrived at this construction of the will largely because of the fact that they inferred that the testator knew that camp-meetings were temporary affairs, lasting only a few weeks each year, and that therefore the balance of the use of the land descended to the heirs. This is a very curious case. There was nothing to prevent the heirs from selling the land themselves, and the purchasers would take subject to the right of the Methodist Church.

⁶ P. L. 503.

⁷ For a case of sale under this act and discussion thereof, see Burton's App., 57 Pa. 213 (1868). For other cases of sales under the act see Stallman's App., 38 Pa. 200 (1861); and Fisher's App., 162 Pa. 232 (1894), where Mr. Justice Williams placed the power exercised before the Act of 1853 solely on such acts of

the same trusts, as the act does not authorize a diversion to other purposes. It has been intimated, by way of dictum, that the method of sale prescribed by the Act of 1853 is exclusive, and that the courts have no further power to authorize any sale under their inherent equity jurisdiction.⁸

How Far can the Donor Prevent the Sale by a Proviso in the Trust Settlement?

759. It seems clear, on principle, that any restraint on alienation imposed on the legal title of property given in trust for charity is null and void. The court cannot permit its jurisdiction either under the Act of 1853 or in the exercise of its original chancery jurisdiction to be ousted by any proviso of the donor. In *Fisher's Appeal*⁹ the testatrix inserted in her will a provision that no part of the property devised in trust "shall be sold or disposed of, encumbered or applied to any use or purpose than as" (mentioning the charity). A decree directing the sale under the Price Act was affirmed by the Supreme Court, on appeal, *Williams, J.*, placing the decision on the ground that the phrase only meant that the trustees should not divert the land to any other use, and as the proceeds would be used for the same charity, the sale could not be said to be for any other use. He concluded with the following dictum: "Nothing short of a plain, unequivocal direction that no part of the land shall be parted with for any purpose whatever ought to be held sufficient to restrain the managers from doing that which the interests of the charity under their control require of them." If by this he meant a sale by the managers, the dictum is authority for the proposition that a provision in the trust settlement which

legislature as might be procured, passed in the exercise of the power of the state as visitor of all charitable institutions, thus ignoring the cases where the power has been exercised without an act. *Church's Pet.*, 139 Pa. 61 (1896); *Church's Pet.*, 166 Pa. 43 (1895); *Funck's Est.*, 16 Super. Ct., 434 (1901); *Corr's Est.*, 29 Pa. C. C. 276 (1903); see the vague case of *Church v. Gray*, 198 Pa. 321 (1901). For a case where a sale was set aside because not made on petition by parties interested, see *Gum-*

bert's App., 110 Pa. 496 (1885). The jurisdiction of the Orphans' Court in the case of a testamentary trust and sale under the Price Act, is conclusive on the Common Pleas: *Mercer Home v. Fisher*, 162 Pa. 239 (1894).

⁸ *Mitchell, J.*, in *Nauman v. Weidman*, 182 Pa. 263 at 266 (1897); see, however, the ambiguous case of *Evangel. Luth. Church v. Township*, 35 Pa. C. C. 348 (1908).

⁹ 162 Pa. 232 (1894).

restrains a sale is valid. No other Pennsylvania case has been found, and the law, therefore, is in doubt.¹⁰

Lease by Trustee of a Charitable Trust

760. The question of the power of the trustees of a charitable trust to make a lease has not come up for decision in Pennsylvania.¹ A lease for 999 years by a trustee of a charitable trust was before the court in *Griffin v. Fellows*² and the *Providence Trustees' Appeal*,³ and the validity thereof was sustained.

Preliminary Discussion and Definition of Cy Pres

761. The chancellor acts in personam, and directs the party having the legal title to deal with it or convey it, as the circumstances of the case require; that is, in such manner as to prevent an unjust enrichment of one party at the expense of another. Where there is an express trust, justice requires that the trustee be directed to act for the benefit of the persons designated by the provisions of the gift, whenever those persons can be ascertained and the provisions carried out; but if the provisions cannot be carried out, or if the beneficiaries cannot be ascertained, the chancellor may act in one of three ways: (1) he may permit the trustee to keep the property, which is obviously unjust, as it was never intended that the trustee should take beneficially, and naturally such a course is rarely followed; (2) he may direct the trustee to hold it for the benefit of the next of kin or heir at law, according to the nature of the property; this is in accordance with the doctrine of resulting trust, and is the disposition which is usually made;⁴ (3) he may supply new beneficiaries in place of those who cannot be ascertained or who cannot take, and direct the performance of the trust accordingly. The chancellor justifies his action in making such a disposition of the case under the doctrine of cy pres,⁵ which may be defined as the doctrine that where an intention is disclosed which cannot

¹⁰ Except the decision that the original settlor has no standing to object to the sale; see *Church's Pet.*, 166 Pa. 43 (1895); confer Part II on restraints on alienation.

¹ For a discussion of the subject, see

Hill, Trustees, Bispham's ed. (1867), pp. 720, 721.

² 81½ Pa. 114 (1873).

³ 2 Walker, 37 (1885).

⁴ See §151, ante.

⁵ Cy pres or as nearly as possible.

be carried out, the court will direct a disposition which is as near as possible to the one originally intended. Several other definitions of cy pres are added in the note.⁶ This doctrine, which is of general application in a court of chancery, is most commonly applied in cases of charitable trusts which, by reason of the uncertainty of the objects and the indefiniteness of the duration of the trust, are more liable to fail because of unforeseen circumstances. The cy pres doctrine concerns itself solely with justifying the court in supplying new beneficiaries for those designated. It has nothing to do, therefore, with the question of an appointment of a trustee or the question as to who is to act as trustee. It does not ascertain the intention of the testator; it presupposes an intent which has failed or cannot be ascertained.⁷ The doctrine of cy pres is purely equitable and is not applicable except where there is an express trust declared; consequently when there is a direct gift by will at law which cannot take effect, the property embraced in the gift will fall into the residue, if any, and if there is no residuary devise there will be an intestacy.⁸ If

⁶ "Where a gift is made to a trustee for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application; and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent." Bispham, *Equity*, 7th ed. (1905), p. 198. "The meaning of the doctrine of cy pres, as received by us, is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it

must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence." Lowrie, C. J., in *City of Phila. v. Girard's Heirs*, 45 Pa. 9 at 28 (1863).

⁷ Mr. Perry, *Trusts*, 5 ed. (1899), Vol. 2, §723, says: "Cy pres as applied to judicial acts is a rule of construction and not of administration." It is submitted that the learned author is in error in this position. The doctrine is a rule justifying the court in carrying out the trust.

⁸ *Houston's Est.*, 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Mont. 151. The decedent, who died in 1845, gave \$500 to the Penna. Anti-Slavery Soc. The fund was awarded to the next of kin upon an account filed in 1903, the society having ceased to exist. Query: whether this case should not have been disposed of under the doctrine suggested in *Commonwealth v. Pauline Home*, 141 Pa. 537 (1891), stated §771, post.

the gift is by deed inter vivos the property will remain in the grantor, just as it was before.

Reasons for the Doctrine of Cy Pres

762. It has been stated by a learned author⁹ that this doctrine, in its application to charities, originated in the fact that in medieval times charitable dispositions were made use of so largely to allay the superstitious fears of the donor and purchase his peace with heaven that the chancellor in dealing with cases where the donor was dead very naturally took the ground that if the charitable use designated failed, another one should be raised, as it would not do to defeat the gift of the deceased, for which he had, it was to be hoped, received his consideration.¹⁰ The doctrine thus originating, was carried over into modern times, for reasons the learned author was not able to discover, after the superstitious notion in which it had originated had passed away.¹¹ As a charitable use was generally indefinite, the cases where the trust could not take effect usually arose after a long period of years, because circumstances had so changed that the trust could not be carried out. It was in these cases impracticable and frequently impossible to ascertain who were the representatives of the testator. The chancellor, therefore, took hold of the cy pres doctrine as the most convenient way out of the difficulty, as it justified him in substituting new beneficiaries. Furthermore, as the testator showed by his attempted charitable disposition that he did not intend to benefit the heir at law or next of kin, there is no injustice in not giving the property to them. And as the trustee cannot take beneficially, there seems to be no reason why the chancellor should not substitute a new beneficiary instead of decreeing a resulting trust.¹

Cy Pres Doctrine Has Been Confused with Discretion

763. The cy pres doctrine has been confused with the subject of discretion.² The doctrine, however, can be applied only

⁹ Illustrations of the Origin of Cy Pres, 8 Harv. Law Rev. 69 (1894), by Mr. Jos. Willard.

¹⁰ Originally the doctrine was only applicable to the case of a trust created by will. This distinction probably does not exist in Pennsylvania. See §776, post.

¹¹ See remarks of Lord Chief Justice Wilmot in *Attorney-General v. Downing*, 1 Wilmot, Notes 1, 33, (1767).

¹ See §724, ante.

² See §158, ante, on discretion in a trustee.

when there is a trust created,³ but so long as the notion that a trust must be created is expressed by the statement that there must be a discretion,⁴ the common remark will be found that the cy pres doctrine is only to be adopted in the case where there is a discretion lodged somewhere in the disposition of the charitable gift.⁵ It is apprehended that it is not necessary to confer any discretion in the creation of a trust in order that the cy pres doctrine may be applied. The application of the doctrine does not depend in any way upon the presence or absence of an express discretion.

Common Instances of the Application of the Doctrine of Cy Pres

764. The most common instance of the application of the doctrine of cy pres occurs in the case of a gift for an indefinite class. Strangely enough, the operation of the doctrine in these cases is rarely noticed. Suppose there is a gift in trust to feed the poor of the city of Philadelphia; it is plain that under the strict rules of the trust all the poor in the city of Philadelphia have an equal right to be fed, and the trustee, if his conduct were governed by the strict provisions of the settlement, would be required to proceed and feed all the poor persons. All the poor persons cannot be ascertained, and the trust property would be insufficient to feed them all in any ordinary case. The trust, therefore, is a practical impossibility, according to its strict terms. The court will, however, under the doctrine of cy pres, permit the trustee to feed as many of the poor people as will be provided for by the funds he has in hand; that is to say, where all the objects designated cannot be benefitted, the court will direct an application to as many of those designated as possible.⁶

³ See §761, ante.

⁴ See this subject discussed, §§745, 746, ante.

⁵ Gibson, C. J., in *Pickering v. Shotwell*, 10 Pa. 23 at 28 (1848); Ashman, J., in *Houston's Est.*, 28 Pa. C. C. 285 (1903). The addition by Ashman, J., that the cy pres doctrine was to be applied only when the object itself is permanent, is probably a slip of the pen, for if the object is permanent no occasion can ever arise for the application of the cy pres doctrine unless the object is illegal; see §777, post. The learned judge may have

meant vested.

⁶ Another common instance occurs in the case of a trust for a schoolhouse which has been transferred under the common school legislation to the public school directors, as to which see §790, post. See also cases of express discretion where no objects are designated and there is a general charitable intent disclosed; §749, ante. It is also said that the court will under the cy pres doctrine construe a gift to a charity upon a remote contingency as a present vested gift whenever possible: see Frank-

The Doctrine of Cy Pres Criticised

765. The doctrine of cy pres has been much discussed and very severely criticised as being unsuitable to American institutions. The court of chancery, it must be remembered, was presided over by the chancellor, who was the keeper of the king's conscience, and combined with his judicial duties many duties of state and of an executive nature, besides presiding in the House of Lords. The king as *parens patriae* had power of supervision over eleemosynary corporations, and his power in this respect was almost unlimited. The authority of the king in this particular was generally exercised through the lord chancellor, and the cases of such exercise were reported with the other judicial proceedings of the court, from which confusion in the reports the distinction between the two kinds of jurisdiction now known as the judicial and prerogative cy pres was not always borne in mind, and the judicial cy pres was frequently supposed to have greater application than properly belonged to it.⁷

Preliminary Discussion and History of the Doctrine of Cy Pres in Pennsylvania

766. The doctrine of cy pres seems to have been viewed with particular aversion in the early history of the state. It was characterized by Gibson, C. J.,⁸ in the following language: "The doctrine of cy pres is too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."⁹ The reasons for that aversion

lin's Est., 150 Pa. 437 (1892), and the language of Penrose, J., in the court below, in 27 W. N. C. 545 (1891). See also gifts to corporations not in esse, §786, post. And see Act of May 26, 1876, P. L. 211 §1, as to which, see §769, post.

⁷ Perry, *Trusts*, 5 ed. (1899), Vol. 2, §§718, 719.

⁸ In *Methodist Church v. Remington*, 1 Watts, 219 at 227 (1832); Mr. Perry in his treatise on *Trusts*, 5 ed. (1899), Vol. 1, §729, n. 1, says that this was a case calling for the exercise of the prerogative power; on the question of citizenship, the law has been changed. The remarks of the judge as to cy pres were

dicta, as the case arose as to a trust created by deed, which was not subject to the application of the cy pres doctrine at that time.

⁹ See also remarks of the same judge in *Witman v. Lex*, 17 S. & R. 88 at 93 (1827), as follows: " * * * It may safely be suggested, however, that in many particulars the relief which we shall be able to afford through the medium of common law forms, will necessarily fall short of that which would be administered by a chancellor. Indeed no one would desire to see the doctrine of cy pres carried to the extravagant length that it was formerly, or witness

are perhaps more suitable for discussion in an historical treatise than in a book on law. One reason may be noticed with propriety: in a new and poor community, such as Pennsylvania then was, no case would arise where a charitable trust had existed for many years, and every case involved a conflict between representatives of the donor in esse and the discretion of the court. There was, therefore, a natural repugnance felt to the application of the cy pres doctrine, and the court leaned toward the implication of a resulting trust. As, however, the community became more settled, and charitable foundations became ancient, the usefulness and practical justice of the cy pres doctrine became more generally recognized. The Act of May 23, 1895,¹⁰ and the Act of May 26, 1876,¹ seem to have caused a change in the judicial attitude. The doctrine is now admitted cautiously and with qualifications. It is a reasonable doctrine,² and is part of the common law power of the state,³ although the remarks of Gibson, C. J., in *Methodist Church v. Remington*,⁴ are quoted with approval by Ashman, J., in *Houston's Estate*.⁵ There is a great dearth of authority in Pennsylvania on the subject of cy pres, and the law is somewhat obscure. The subject will perhaps be best understood by discussing the cases and statutes in chronological order.

Griffitts v. Cope

767. In *Griffitts v. Cope*⁶ the testator had in 1747 devised to trustees to be nominated, in fee, a lot of ground upon which to build a meeting-house if the members of a certain meeting should agree to build a meeting-house there, but not otherwise. The meeting-house was built and used as such for nearly one hundred years. The meeting was subsequently abandoned, and a new meeting-house built at another place, and the old meeting-house rented for mercantile purposes. The heirs of the original testator brought ejectment and claimed

the exercise of an arbitrary discretion in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter by disposing it to such charities as the court chooses to direct. No such discretion would be exercised by this court."

¹⁰ P. L. 114, re-enacting the 10th Sec. of the Act of April 26, (1855), P. L. 328; see §769, post, and §735, ante.

¹ P. L. 211, §1; see §769, post.

² Dictum, Lowrie, J., in *City of Phila. v. Girard Heirs*, 45 Pa. 9 at 25 (1863).

³ Noyes, P. J., in *Trim's Est.*, 168 Pa. 395 at 397 (1895).

⁴ 1 Watts, 219 at 227 (1832).

⁵ 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Montg. 151.

⁶ 17 Pa. 96 (1851).

to recover because the trust had been abandoned by the donee. The meeting had sold the property, and the vendee refused to take, because of a defect in the title. It seems, although not so stated in the report, that the proceedings were for the purpose of settling the doubt raised by the vendee. Judgment was given for the defendant. The sale of the land and use of the proceeds for even another meeting-house would clearly involve a change in the specified object of the donor. This case is a recognition, although no reference is made in the opinion, of the doctrine of *cy pres* as against a resulting trust. The language of Lewis, J.,⁷ is significant. The learned judge said: "it seems unreasonable to suppose that, a deviser ever means that his heirs shall get back the land in such cases, except when he says so; or that, amidst the rapidly changing opinions of society, he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society; or that he means that no change in the number, circumstances, and habits of the people, shall ever justify any sort of conversion of the gift. It would seem contrary to public policy to favor a construction that would give to a man, who died a hundred or a thousand years ago, the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied." We see the doctrine of *cy pres* beginning to creep in, although not so recognized by the court.

Newell's Appeal

768. In *Newell's Appeal*⁸ there was a bequest of \$2,500 to the Theological Seminary at Princeton, N. J., upon trusts which were attacked as insensible, unlawful and void. A controversy arose on the adjudication of the account of the executors of the will, and the fund was claimed by the Seminary and residuary legatees. The Supreme Court, Woodward, J., declined to pass on the question of the validity of the trust, saying that the directions were subsequent to the vesting of the legacy, and consequently the Seminary was entitled to the fund, and that if the limitations were void, the legacy would be vested in the Seminary clear of the conditions, and the question whether she was bound to perform conditions subse-

⁷ 17 Pa. 99.

⁸ 24 Pa. 197 (1855).

quent should be determined when she was sued for forfeiture. If, however, the trust was void, there would be a resulting trust, and, as all parties were in court, it seems that there was jurisdiction to determine the matter. The decree awarding to the Seminary amounts to an application of the doctrine of *cy pres*.

Legislation in Pennsylvania Affecting the Doctrine of Cy Pres

769. The Act of May 23, 1895,⁹ provides that no disposition of property for any religious, charitable, literary or scientific use shall fail by reason of the objects ceasing or being given in excess of the annual value limited in the act; but it shall be the duty of the proper court to carry into effect the intention so far as the same can be ascertained, and carried into effect consistently with law or equity, with the further provision that if the objects are not ascertainable or have ceased to exist, or are in excess of the annual value limited by law, such disposition, so far as exceeding the power of the courts to determine the same by rules of law or equity, shall be taken to have been made subject to the disposition of the legislature in manner as nearly conformable with the intent of the settlor as practicable; or otherwise, to accrue to the public treasury for public use.¹⁰ The Act of May 26, 1876,¹ provides as follows: "Whenever any estate, real or personal, shall be vested in trustees, by gift or devise, for the purpose of applying the income arising therefrom for the benefit, support or maintenance of a designated class of persons, which said class of persons shall become extinct, so that there shall be no one to derive any benefit from the said income, if there be no heirs to claim said fund, it shall and may be lawful for the said trustee or trustees having charge of the said estate, to apply, by petition, to the court of common pleas of the county in which they, or a majority of them reside, for authority to apply the said income to the benefit, support or maintenance of some other class or classes of persons similarly situated, as near as may be, to those for whose benefit, support or maintenance the trust was originally created; and thereupon the said court of common pleas, after proper examination into the statements set forth in the petition, and being satisfied

⁹ P. L. 114, re-enacting the 10th Sec. of the Act of April 26, 1855, P. L. 328.

¹⁰ For the text of the act, see §735, ante.

¹ P. L. 211, §1.

as to the correctness of the same, may have power to order and decree that thenceforth the trustees shall apply the said income to the benefit, support or maintenance of the new class or classes of persons mentioned in the said petition." This act has only been referred to twice since its passage.² The language of these acts seems to furnish ample legislative sanction for the courts to apply the doctrine of cy pres.

In Re Petition of Trustees of Lower Dublin Academy

770. In re Petition of Trustees of the Lower Dublin Academy³ there was a trust of a lot of ground for a school under an agreement by the heirs of the decedent. On petition of the trustees the court directed the appropriation of the income, there being no further necessity for a school owing to the establishment of a public school system, to the support of a library in the same vicinity. In the above case the court referred to a previous case, apparently not reported, where they directed the distribution of the proceeds of the sale of land held in trust for a Protestant school, among the Protestant churches of the neighborhood. This is a clear case of the application of the doctrine of cy pres.

Commonwealth v. Pauline Home

771. In *Commonwealth v. Pauline Home*,⁴ a charitable corporation for the maintenance of a home for poor children in the Twenty-second Ward, was dissolved. The court awarded the proceeds of the sale of the trust property to the Children's Aid Society, in trust, for (1) the care of poor children not otherwise properly provided for, within the Twenty-second Ward of Philadelphia, who otherwise would presumably be sent to the almshouse; (2) to the care of such children from Philadelphia County; (3) to the care of such children from Pennsylvania, giving preference to those living nearest Philadelphia County. The Master, to whom the case was referred in the court below, and whose opinion was affirmed on appeal to the Supreme Court, placed the decision on the 10th Section of the Act of April 26, 1855,⁵ and the application of the doc-

² By Noyes, P. J., in the court below 19 Montg. 151.
in Trim's Est., 168 Pa. 395 at 397 (1895); ³ 8 W. N. C. 564 (1880).
Ashman, J., in Houston's Est., 28 Pa. ⁴ 141 Pa. 537 (1891).
C. C. 285 at 286 (1903), s. c. 12 D. R. 121 ⁵ P. L. 328.

trine of cy pres. The Supreme Court declined to pass on the question of the weight to be given the wishes of the contributors, and in a very short and unsatisfactory per curiam opinion, said that the matter was very much in the discretion of the court below, and that they would not reverse unless for clear abuse.

Smith's Estate

772. In *Smith's Estate*⁶ the court below said, by way of dictum, that where there was a trust to erect a playground and memorial arch in a public park, the court could apply the gift cy pres if the assent of the public authorities could not be had.

Cushman v. The Church

773. In *Cushman v. The Church*⁷ the plaintiff, with others, contributed money to build a memorial church to certain persons upon a certain piece of ground. A church society was formed and incorporated, and the church built soon afterward. The church authorities then proposed to build a new church at another place, as a memorial to another person, and tear down the old one which had been built. The plaintiff filed a bill in equity to restrain the trustees in their action, and the demurrer of the church to the bill was overruled. The court intimated that the trustees might, on application to the court, obtain leave to sell the church property and invest in a new one under the same trust. The bill was remitted for further proceedings, and the preliminary injunction reinstated. There was no occasion for the application of the doctrine of cy pres. The action of the church authorities in attempting to divert the property to another use was very properly restrained.

Harman v. Romberger

774. In *Harman v. Romberger*⁸ the heirs of a testatrix, who died in 1900, brought ejectment against the trustees under the will, claiming that a charitable use was declared which ceased to exist, and that, therefore, the property should go to the heirs at law. Curiously enough, both court and counsel overlooked the Act of 1895, and discussed the case as if turning on the Act of 1885.⁹ The court decided that there could

⁶ 181 Pa. 109 (1897).

⁷ 162 Pa. 280 (1894).

⁸ 34 Pa. C. C. 593 (1908).

⁹ See §735, ante.

be no recovery, as the act only referred to the case where the charity ceased to exist at the death of the testatrix; that as there was no clause of re-entry in the deed, the heirs could not get the title. It appeared that the charitable use existed at the death of the testatrix.¹⁰

Who May Invoke the Application of the Doctrine of Cy Pres

775. It is provided by the Act of May 23, 1895,¹¹ that proceedings may be instituted under the act by leave of the attorney-general of the commonwealth, on the relation of any institution, association or corporation not for profit, or individual desirous of carrying the charitable trust into effect.¹² The law on this point seems very clear, and requires no further comment.

Doctrine in Pennsylvania Probably Applies to Trusts Created by Deed

776. The doctrine of cy pres applied only to gifts by will.¹ It seems, however, if the doctrine of cy pres was established in Pennsylvania by the Act of May 23, 1895,² that this distinction no longer exists, as that act applies equally to gifts by deed and will. There have been a number of cases since the Act of 1855 in Pennsylvania, in which the cy pres doctrine has been applied to gifts by deed,³ without the question being raised. It may therefore be said that the distinction no longer exists in Pennsylvania law.

Pennsylvania Law as to Doctrine of Cy Pres

777. The provisions of the acts relating to cy pres⁴ are so

¹⁰ See also dictum of Hawkins, P. J., in *Daly's Est.*, 208 Pa. 58 at 66 (1904).

¹¹ P. L. 114, re-enacting §10 of the Act of April 26, 1855, P. L. 328.

¹² For a case of such proceedings, see *Commonwealth v. Pauline Home*, 141 Pa. 537 (1891). For a case of a proceeding by the donor of the trust in the case of a deed, see *Wright v. Trust Co.*, apparently not reported, C. P. No. 4, Phila. County, Dec. Term, 1895, No. 1242, in equity. Case of a proceeding by the trustees, see *In re Petition of the Trustees of Lower Dublin Academy*, 8 W. N. C. 564 (1880).

¹ In *Methodist Church v. Remington*, 1 Watts, 219 (1832), Gibson, C. J., at 227 discussed the cy pres doctrine as applicable to a trust created by deed inter vivos.

² P. L. 114, re-enacting §10, Act of April 26, 1855, P. L. 328.

³ *Commonwealth v. Pauline Home*, 141 Pa. 537 (1891); *Petition of the Trustees of Lower Dublin Academy*, 8 W. N. C. 564 (1880); *Wright v. The Trust Co.*, apparently not reported, C. P. 4, Phila. County, Dec. Term, 1895, No. 1242.

⁴ See §769, ante.

obscure and the authorities are so meagre that no definite conclusion can be drawn as to the law. As, however, the state grows older and wealthier and charitable foundations increase, the doctrine will undoubtedly be more frequently discussed and applied. But little can be done now except to indicate a few general principles. The doctrine is perhaps, in its nature incapable of being reduced to exact limits, and if it were so reduced its usefulness would be considerably diminished. It has been said that the cy pres doctrine now exists in Pennsylvania in all its branches.⁵ There is nothing in the Acts of 1855 or 1895 to support this statement, and it has been expressly decided that the doctrine does not apply to a gift at law.⁶ It has also been said that the doctrine only applies where a discretion is lodged somewhere in the disposition of the charitable gift or where the object itself of the gift is permanent.⁷ It has also been said that the doctrine does not apply where the charity has ceased to exist at the testator's death,⁸ on the ground that the act does not apply to the case where the gift shall become void. Yet, on the other hand, it has been observed that the doctrine does not apply when the gift is unlawful because made within thirty days of the donor's death.⁹ The true principle, it is apprehended, is this: where there is a vested gift in trust for a charity, and at any subsequent time, for any reason, it appears that the property embraced in the trust cannot be applied to the purposes originally designated, the court will, under the doctrine of cy pres, direct an application to other charitable objects as near as possible to those which were specifically indicated. Where, however, there is a gift in trust which cannot take effect because of the application of the rule against perpetuities,¹⁰ the doctrine of cy pres cannot be applied, because there has never been a complete gift to a charitable object. In this case, therefore, the court will always decree a resulting trust to the residuary devisee, heir at law or next of kin, according to the circumstances.¹ Where the gift is at law, the doctrine

⁵ Bispham, *Equity*, 7 ed. (1905), p. 200, n. 7.

⁶ *Houston's Est.*, 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Montg. 151.

⁷ *Ashman, J.*, in *Houston's Est.*, 28 Pa. C. C. 285 (1903), s. c. 12 D. R. 121, 19 Montg. 151.

⁸ *McCarrell, J.*, in *Harman v. Rom-*

berger, 34 Pa. C. C. 593 at 595, 596 (1908).

⁹ *Penrose, J.*, in *Alter's Est.*, 4 Pa. C. C. 558 (1887).

¹⁰ For a discussion of when the rule applies, see §§726, 730, ante.

¹ See §151, ante, on resulting trusts, and §460, n. 5, ante.

of cy pres is inapplicable except in the case of a present gift to the members of an indefinite charitable class.² Where the gift is in trust for a definite charitable corporation, and the corporation dissolves or ceases to exist, there is no reason why the court should not, if the gift survives the rule against perpetuities, apply the doctrine of cy pres and direct a disposition of the fund accordingly.³

Preliminary Discussion of Gifts to Charitable Corporations

782. All gifts to specific charitable corporations may be considered as gifts to definite charitable objects. Such a gift may be made in two ways, directly or in trust; thus, a legacy to the Old Men's Home, or a legacy to B. in trust for the Old Men's Home. In the first case, the gift will immediately vest in the corporation; in the second place, the trust will remain in the hands of the trustees specified, and the home will receive the income. Where there is a direct gift at law, it is sometimes said that there is an implied trust, the corporation being the trustee for the purposes of the institution. This, however, is an unnecessary fiction. The charter of the corporation and the laws applicable thereto effectually fix the control and destiny of the fund, and there is no occasion to have recourse to any doctrine of trust. This fiction has served its purpose in the development of the law and can now be discarded. It was probably introduced in the early history of the state in order to support gifts which it was erroneously supposed would otherwise be void. A direct gift to a charitable corporation which is not remote is always valid except for the statutes of mortmain. It may have been supposed that the invalidity of the gift to a charitable corporation rested on the same ground as the invalidity of a gift at law to indefinite objects, and that it was consequently necessary to imply a trust in order to sustain the gift.

Gift to Charitable Corporations Forbidden by Statutes of Mortmain

783. Gifts to charitable corporations were forbidden in England by the statutes of mortmain. The judges in their note at the end of the report on the English statutes in force in Penn-

² For a discussion of such gifts, see §§722, 723, ante.

³ *Commonwealth v. Pauline Home*, 141 Pa. 537 (1891), stated §771, ante.

sylvania,⁵ speaking of the statutes of mortmain, said: "They are so far in force, that all conveyances, either by deed or will of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature, and not calculated to promote objects of charity or utility." A charitable corporation is also limited in the amount of property which it may hold.⁶ A detailed discussion of the subject seems to fall under the law of private corporations. A few matters, however, may be noticed as peculiar to charitable gifts.⁷

Gifts of Real Estate to a Foreign Charitable Corporation

784. In *Thompson v. Swoope*⁸ it was decided that a foreign charitable corporation could take land in Pennsylvania by devise. This was altered by the Act of April 26, 1855,⁹ which provided that no corporation other than such as should have been incorporated under the laws of this state, should thereafter acquire and hold any real estate in Pennsylvania directly or by or through any trustee.¹⁰ By the Act of June

⁵ 3 Binney, 595 at 625 (1808).

⁶ See §657, ante, as to domestic corporations, and §785, post, as to foreign corporations.

⁷ The trustees of a charitable trust: *Brown v. Hummel*, 6 Pa. 86 (1847), or the persons interested: *Gumbert's App.*, 110 Pa. 496 (1885), *Stevens's Est.*, 200 Pa. 318 (1901), may incorporate themselves: *City v. Bicknell*, 35 Pa. 123 (1860), and receive the fund from the trustees under the will: *Stevens' Est.*, 200 Pa. 318 (1901).

⁸ 24 Pa. 474 (1855).

⁹ P. L. 328, §5.

¹⁰ For a case of a devise to a foreign corporation void under this act, see *Fraser v. St. Luke's Church*, 147 Pa. 256 (1892); in that case, the testator devised certain ground rents directly to a charitable corporation. It appeared that there was no corporation by that name, but that there was a New York corporation of nearly the same name. The will was

dated April 9, 1863, and it was argued that the New York corporation could not take because at the time the will went into effect the foreign corporation could not take the gift, under §5 of the Act of April 26, 1855, P. L. 328. The court appointed a trustee to take the title and hold in trust for the New York corporation. In a case stated between the trustees and the owner of the ground rent, for the arrearages of ground rent, the court gave judgment for the plaintiff, which on appeal, was affirmed. The case was not within the Act of June 8, 1891, P. L. 211, because that act was not retrospective. This decision in effect ratified the act of the court in appointing a trustee. The trust as declared was illegal at the date of the death of the testator. In order, however, that it might not fail the court appointed a trustee who could take the legal title.

8, 1891,¹ it was provided that a corporation chartered under the laws of any state in the United States, may take and hold real estate devised for charitable or religious purposes, provided that such real estate be sold within five years from the time the right of possession shall accrue.²

Gift of Personal Property to a Foreign Charitable Corporation

785. A gift of personalty to a foreign charitable corporation is good.⁴ It seems that although domestic charitable corporations are limited in the value of property which they may hold,⁵ no such limit is placed on the holdings of foreign charitable corporations.⁶

Gift to a Corporation Not in Esse

786. Where there is a gift to a charitable corporation not in esse the gift cannot take effect immediately because there is no one to take. The court will not consider the formation of the corporation a condition precedent to the vesting of the gift, but will, under the doctrine of cypres,⁷ direct the trustee to hold the fund until the corporation shall have been formed.⁸ The dictum of Sharswood, C. J.,⁹ where he said, "We must conclude then that this remainder, limited to a corporation thereafter to be created, was void, because there was no devisee competent to take at the time, and the possibility that there might be such a corporation during the particular estate for life was too remote," may, in so far as it was applicable to a charitable corporation, be considered as disregarded in the

¹ P. L. 211.

² No case has arisen under this act as to the effect of the clause directing the real estate to be sold within five years. See Act of March 21, 1907, P. L. 21.

⁴ Domestic and Foreign Missionary Society's App., 30 Pa. 425 (1858); Newell's App., 24 Pa. 197 (1855). Point not discussed or argued.

⁵ See §657, ante.

⁶ See remarks of Lowrie, J., in Thompson v. Swoope, 24 Pa. 474 at 482 (1855).

⁷ Gray, Rule Perp., 2 ed. (1906), §§607, 608.

⁸ See Zimmerman v. Anders, 6 W. & S. 218 (1843), which was a case of a gift

of real estate to an unincorporated association which subsequently became incorporated; Witman v. Lex, 17 S. & R. 88 at 92 (1827); Act of April 26, 1855, §10, P. L. 328, re-enacted by Act of May 23, 1895, P. L. 114; Lewis's Est., 152 Pa. 477 (1893); Fisher's App., 162 Pa. 232 (1894); Daly's Est., 208 Pa. 58 (1904). In Stevens's Est., 164 Pa. 209 (1894), s. c. 200 Pa. 318 (1901) the trustee was directed to procure a charter.

⁹ In Zeisweiss v. James, 63 Pa. 465 at 468, (1870). The learned judge inaccurately states the period prescribed by the rule against perpetuities, as to which see §328, ante; confer §422, n. 2, ante.

later cases.¹⁰ If the formation of a corporation were considered a condition precedent, the gift would be remote and void, as the corporation might not be formed within the period prescribed by the rule against perpetuities.¹ In this respect, therefore, the remarks of Ferguson, J., in *Pepper's Estate*,² are open to objection. The learned judge said that although a corporation might not be formed within the time prescribed by the rule against perpetuities, yet a gift to a charity was an exception, and that in such case the court would allow the fund to be transferred to a corporation constituted within a reasonable time afterward.³ A gift to a definite charitable corporation is clearly within the rule against perpetuities.⁴ The gift is upheld under the *cy pres* doctrine, and not as an exception to the rule against perpetuities.

Trusts for the Erection of Tombs and Monuments

787. "A monument to the deceased or for his grave is esteemed a part of his funeral expenses."⁵ A trust for such a purpose is, therefore, valid.⁶ No case has been found in Pennsylvania extending this rule to the erection of the monument to a person other than the deceased.⁷ It is doubtful how far a trust for the erection of a monument comes within the provisions of the Act of May 26, 1891.⁸

Trusts for the Repair of Tombs and Monuments

788. "Trusts for the perpetual repair of tombs and monu-

¹⁰ See Gray, *Rule Perp.*, 2 ed. (1906), §626, and n. 4, for discussion of this case.

¹ Gray, *Rule Perp.*, 2 ed. (1906), §605.

² 154 Pa. 331 at 336 (1893).

³ Exceptions being filed, the court in banc, Hanna, P. J., said that the case was provided for by the Act of May 9, 1889, P. L. 173 (see Act of May 23, 1895, P. L. 114, re-enacting Act of April 10, 1855) and on appeal, the Supreme Court affirmed, without discussing the point at all. It is very difficult to see how the case can be brought within the acts of assembly except in so far as these acts establish the doctrine of *cy pres*.

⁴ See §730, ante.

⁵ Gray, 15 Harv. Law Rev. 515 (1902).

⁶ *McGlinsey's App.*, 14 S. & R. 64 (1826); see *Porter's Est.*, 77 Pa. 43 (1874), in which it was held that a gift for such a purpose was not charitable, and, therefore, valid, even though contained in a will made within one month of the testator's death. As to this, see §737, ante. The amount to be expended by the executor, when no amount is specified, is to be determined by the court, according to the circumstances of the case: *Ingles's Est.*, 76 Pa. 430 (1874); *Bainbridge's App.*, 97 Pa. 482 (1881).

⁷ As to this, see Gray, 15 Harv. Law Rev. 515 (1902).

⁸ P. L. 119; referred to in §788, post.

ments were originally held to be charitable; bad, if they contravened the mortmain act; but otherwise good."⁹ The later English doctrine was that such a trust was invalid, and such was the law in Pennsylvania.¹⁰ The old English doctrine was restored in Pennsylvania by the Act of May 26, 1891.¹ Such trusts are exempt from the payment of collateral inheritance tax by the Act of March 5, 1903.²

Trusts For Saying Masses

789. A trust for saying masses was void in England as a superstitious use,³ but is valid in Pennsylvania as a charitable gift.⁴

Trusts for Schoolhouses

790. There were a number of cases in the early history of the state, before the public school system had been established, of trusts for the erection of schoolhouses for the use of the neighborhood. One neighbor would give the lot of ground, and he and the others, or the others without him, would subscribe the money to build the schoolhouse. The neighbors would then employ a teacher to manage the school, and the ones who took charge of the school were called the employers. The form, therefore, in which the conveyance in trust was generally expressed was, "to the employers of a certain school, to hold for a schoolhouse," etc.⁵ By various acts of assembly the trustees of these schools were authorized to convey the trust property to the school directors established

⁹ Gray, 15 Harv. Law Rev. 517 (1892), and cases cited.

¹⁰ Trustees v. Wells, 5 Pa. C. C. 92 (1888).

¹ P. L. 119. The act reads as follows: "Sec. 1. Be it enacted, etc., that no disposition of property hereafter made for the maintenance or care of any cemetery, churchyard or other place for the burial of the dead, or of any portion thereof, or grave therein, or monuments or other erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but said disposition shall be held to be made for a charitable use." The following cases have arisen since the act: Smith's Est., 181 Pa. 109

(1897); Nauman v. Weidman, 182 Pa. 263 (1897); Brabson's Est., 16 D. R. 669 (1907).

² P. L. 12. See opinion of the Deputy Attorney-General, Graveyard Taxation, 30 Pa. C. C. 369 (1904); confer Long's Est., 22 Super. Ct. 370 (1903).

³ Gray, 15 Harv. Law Rev. p. 518 (1902).

⁴ Rhymer's App., 93 Pa. 142 (1880); Seibert's App., 18 W. N. C. 276 (1886), s. c. 3 Sadler's Cases, 412; O'Donnell's Est., 209 Pa. 63 (1904); Dougherty's Est., 5 W. N. C. 556 (1878).

⁵ Morrison v. Beirer, 2 W. & S. 81 (1841); Kirk v. King, 3 Pa. 426 (1846); Martin v. McCord, 5 Watts, 493 (1836).

by law.⁶ A few cases have arisen on these acts.⁷ The construction, however, is well settled. Where the beneficiaries of the trust are the same as those entitled under the laws to the benefits of the public school, the consolidation is proper, but where the beneficiaries are a particular class or sect of the community, the trust must remain as it was. In one case,⁸ however, where a lot was conveyed in 1794 in trust "for the use of the neighborhood in general for an English Protestant School, and for no other use or uses whatever," and the trustees sold the land under the Act of April 18, 1853,⁹ there is a dictum by Woodward, J., that the lot might have been conveyed to the school authorities of the City of Philadelphia.

Religious Trusts

791. All religious trusts were void in England as superstitious uses, but are valid in Pennsylvania. All property vested in trust for any church, congregation or religious society for religious worship or sepulture or the maintenance of either, must be subject to the control of the lay members of any such church, etc., or such constituted officers or representatives as shall be composed of a majority of lay members, citizens of Pennsylvania.¹⁰ A majority of the male members of lawful

⁶ Act of June 16, 1836, §14, P. L. 531; Act of April 7, 1849, §16, Art. 2, P. L. 444; Act of February 12, 1849, §20, P. L. 108. As to trustees of academies: Act of April 11, 1862, P. L. 471, §16, Act of June 10, 1881, P. L. 119, §1.

⁷ *Martin v. McCord*, 5 Watts, 493 (1836); *Wright v. Linn*, 9 Pa. 433 (1848); *Trustees v. Sturgeon*, 9 Pr. 321 (1848); *Barr v. Weld*, 24 Pa. 84 (1854); *McLain v. School Directors*, 51 Pa. 196 (1865); *School Directors v. Dunkleberger*, 6 Pa. 29 (1847); *Brown v. Church*, 23 Pa. 495, (1854). For a case under the Act of 1863 see *Pott v. School Directors*, 42 Pa. 132 (1862).

⁸ In *Stallman's App.*, 38 Pa. 200 at 203 (1861).

⁹ P. L. 503; see §758, ante.

¹⁰ Act of April 26, 1855, §7 P. L. 328, as re-enacted by the Act of June 2, 1887, P. L. 298, and Act of May 1, 1907, P. L. 132. By proviso of the Act of April 26,

1855, §7, P. L. 328, as re-enacted by the Act of June 2, 1887, P. L. 298, it is provided that no charter thereafter granted by any court for any church, congregation or religious society, shall be valid without requiring such property to be taken subject to the provisions as to lay members. And, by the Act of May 1, 1907, P. L. 132, this provision is amended so as to read that all charters theretofore granted without inserting such clause, shall be as valid as if such clause had been inserted when the charter was originally granted, and so as to validate in full all titles conveyed by such corporations, with a further proviso that all property held by such existing corporation shall be subject to the provisions of the act as to control by lay members in the same manner as if a proviso to that effect had been inserted in the charter when originally granted. The heading in *Pepper & Lewis's Digest of Decisions*, Vol. II, col. 2798, stating

age of any unincorporated church, congregation or religious society, may choose their trustees, who need not necessarily be laymen, and whenever not previously declared, may declare the manner in which the title to their trust property shall be held, and upon due proof of such consent, the proper court may direct the legal title to be conveyed accordingly, so however, that there shall be no diversion of the trust property to any other use than¹ that to which it shall have been conveyed. There have been a number of cases in Pennsylvania in which the congregation of a particular church has split into different factions, and a controversy has arisen as to which faction conforms to the faith of the church and is, therefore, entitled to the original property. These cases turn largely on questions of church law and doctrine.² Other cases have arisen dealing with the validity of a sale made by a church depending on the power and qualifications of the church officers, unfortunately called trustees.³ Both of these subjects lie outside the scope of this book.

Determinable Charitable Gifts at Law

792. There seems to be no more objection to a determinable fee⁴ vested in a definite charitable object,⁵ than to any other instance of a determinable fee. If gifts at law to indefinite charitable objects are valid,⁶ a determinable fee would, it is apprehended, be admissible in such a case. No authority on this point has been found. A determinable absolute gift of personal property seems to be unknown and probably would be invalid owing to the nature of the subject matter of the gift.

the provisions of the Acts of 1855 and 1887 as extending to "charitable corporations and associations," seems to be unsupported by anything in the acts themselves.

¹ By the proviso to §7 of the Act of 1855, P. L. 328, as amended by the Act of June 2, 1887, P. L. 298, and Act of May 1, 1907, P. L. 132, this proviso is amended so that the title shall be held subject to all the terms and conditions upon which the same may have been bequeathed, etc.

² See *Brown v. Church*, 23 Pa. 495

(1854); *Kisor's App.*, 62 Pa. 428 (1869); *Roshi's App.*, 69 Pa. 462 (1871); *Ramsey's App.*, 88 Pa. 60 (1878); *Church's App.*, 88 Pa. 503 (1879); *Greek Church v. Greek Church*, 195 Pa. 425 (1900).

³ See *Firestone v. Church*, 215 Pa. 8 (1906).

⁴ As to the validity of determinable fees, see §27, ante.

⁵ For an instance of such a gift, see *Henderson v. Hunter*, 59 Pa. 335 (1868).

⁶ For a discussion of this point, see §§722, 723, ante.

Determinable Charitable Trusts

793. A determinable trust exists when there is a direction to the trustee to terminate the trust and pay the fund back to the donor or his heirs.⁷ There is no reason, it is apprehended, to sustain an exception in this case where the objects are charitable, and it is submitted that the rule against perpetuities and the rule forbidding restraints on enjoyment should apply equally, whether the gift is in trust for a non-charitable object or for a charitable object. One case has arisen in Pennsylvania where there was such a discretion,⁸ and although the point was not raised for decision, the court seemed to think that the discretion could be exercised at a remote period.⁹ It is often a difficult question of construction to distinguish between a determinable gift at law and a determinable trust.¹⁰

⁷ For a discussion of the application of the rule against perpetuities, see §413, ante; for a discussion of the application of the rule forbidding restraints on enjoyment, see §§524, 539, ante.

⁸ *Lewis's Est.*, 152 Pa. 477 (1893).

⁹ For a further discussion, see Gray, *Rule Perp.*, 2 ed. (1906), §603i.

¹⁰ See *Gumbert's App.*, 110 Pa. 496 (1885); see also *Griffitts v. Cope*, 17 Pa.

96 (1851). For a distinction between a conveyance on condition and a conveyance in trust, see *Barr v. Weld*, 24 Pa. 84 (1854). For a case of a conveyance upon condition and discussion of who may take advantage thereof, see *McKissick v. Pickle*, 16 Pa. 140 (1851), s. c. 21 Pa. 232 (1853). For example of a clause of re-entry, see *City v. Bicknell*, 35 Pa. 123 (1860).

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APPENDIX

794. The Appendix contains a discussion of the cases reported in the Supreme Court¹ while the work was going through the press, and brings the citations down to 224 Pa., p. 416. Some of the cases were noticed in an examination of the advance reports, and are referred to in the previous part of the work. Upon a second examination of the bound volumes, several other cases were discovered, to which the attention of the learned reader will be directed.

Walker's Estate

795. In *Walker's Estate*,² the testator devised certain property to A., with a provision that if she should at any time sell the property for over \$5,000, the overplus was to be paid to B. It is presumed, although the report does not specifically state, that the devise to A. was a devise in fee. This is a case of a clause of forfeiture upon the voluntary alienation of a legal fee,³ with this peculiarity, that the forfeiture only operates upon an aliquot part of the proceeds of the sale. The case arose after the death of B. in a proceeding by A. to enforce her supposed claim. It was too plain for argument that she had no right, the time for the happening of the contingency having passed. It has been submitted that a prohibition or clause of forfeiture upon the voluntary alienation of a legal fee, qualified as to time⁴ or manner,⁵ is void in Pennsylvania, and it is apprehended that the proviso in this case was, in like manner, void, and that B. had no claim in any event.

¹ No cases in point were discovered in the Superior Court from 36 Super. Court to 39 Super. Court, p. 368, inclusive.

² 219 Pa. 181 (1907).

³ This is a very rare form of limitation. Most of the Pennsylvania cases have

been those of prohibition of alienation. See p. 104, n. 4.

⁴ As to forfeiture, see p. 115; as to prohibition, see pp. 115 and 117.

⁵ As to forfeiture, see p. 117; as to prohibition, see p. 118.

Wilson v. Heilman

796. In *Wilson v. Heilman*,⁶ there was a sole and separate use created by deed of trust, under which the court held the cestui que use took an estate tail.⁷ As the gift was merely for the sole and separate use of the cestui que trust, and as the circumstances necessary to the validity of the sole and separate use had ceased to exist, the husband having died,⁸ the statute of uses applied⁹ and the woman had, as the court held, a good and marketable title to the property, the estate tail being turned into a fee under the provisions of the Act of 1855.¹⁰

Fredericks v. Kerr

797. In *Fredericks v. Kerr*,¹ the testator directed his property to be sold and the proceeds disposed of, as directed in the will. The testator, however, especially granted to his executor the term of five years in which to make sale of the real estate. Upon the expiration of the five years, the right to compel the sale attached, and as the legatees took immediate interests in the proceeds, postponed in enjoyment only by the five year clause, there was no violation of the rule against perpetuities.²

Ault v. Karch

798. In *Ault v. Karch*,³ there was a devise to three daughters, with the proviso that none should alien without the written consent of the others. The case arose on a proceeding to settle the marketability of the title to the real estate. All of the daughters joined in the deed, and no question, therefore, as to the clause of prohibition was before the court. It is apprehended, however, that the prohibition was void, as a prohibition on the voluntary alienation of a legal fee qualified as to time.⁴

⁶ 219 Pa. 237 (1908).

⁷ The court said the gift was over on indefinite failure of issue. As the trust was created in 1877, the Act of July 9, 1897, P. L. 213, did not apply, as to which see p. 196, n. 9.

⁸ See p. 345.

⁹ See pp. 77, 78, on the application of

the statute of uses to the sole and separate use.

¹⁰ See p. 14.

¹ 219 Pa. 365 (1908).

² See pp. 241, 242.

³ 220 Pa. 366 (1908).

⁴ See p. 115.

Gibbons v. Connor

799. In *Gibbons v. Connor*,⁵ there was a trust created by will. The court, in an opinion by Fell, J., said,⁶ "It was the intention of the testator, as shown by this provision, that the estates given to his children should be free from the incidents of curtesy and dower, which would have resulted from a vesting of the corpus of the estate in this children * * * To give effect to this intention, if for no other reason, the trust should be upheld." It is submitted that no trust can be created which will take away the legal incidents of an absolute interest.⁷ The only way to cut out curtesy and dower is to create life estates for the persons contemplated. The case arose on a bill for the partition by one of the children, who claimed an absolute legal interest in his share of the estate. The bill was dismissed. The decision was correct anyhow because the trust could not be terminated in any event, unless all the beneficiaries joined in the application. The reasoning in the case is in line with that previously noticed sustaining the validity of a trust of an absolute interest⁸ as against the cestui que trust.

Van Leer v. Van Leer

800. In *Van Leer v. Van Leer*,⁹ the testator gave an absolute estate to his son John, and then by a codicil, provided that the interest should not be subject to voluntary or involuntary alienation.¹⁰ The case arose on an application by John for a conveyance of the legal title. The decree of the court below, refusing to direct the conveyance, was affirmed by the Supreme Court on appeal. Mestrezat, J., who delivered the opinion of the court, did not indicate clearly whether he thought the trust was valid as a trust of an absolute gift, or whether because the codicil reduced the estate to a life estate and provided for a gift over of the principal. It has already been submitted that a trust of an absolute interest, either with or without a clause against alienation is, on principle, void as against the cestui que trust, and that the only way

⁵ 220 Pa. 395 (1908).

⁶ At p. 398.

⁷ See p. 365, and n. 9.

⁸ See pp. 303, 304, 312, as to trust of an absolute interest.

⁹ 221 Pa. 195 (1908).

¹⁰ The case is badly reported, as the exact words of the will are not given, and it cannot be told whether the limitations were such as to reduce the fee to a life estate or not.

the donor can put the principal beyond the reach of the cestui que trust,¹¹ is to create a life estate with a gift over of the principal. The law in Pennsylvania, however, is probably otherwise,¹ and this case does not make the matter any clearer.

Krauczunas v. Hoban

801. In the case of *Krauczunas v. Hoban*,² certain real estate was conveyed in trust to trustees to hold for a certain unincorporated religious society. The case arose on a bill in equity by the society against the trustee who had been substituted in the place of the original ones, for a decree directing him to convey the title to other trustees who had been selected by the members of the society. The defence appears to have been that the canons of the Roman Catholic Church provide that the title to the property of a church of that denomination must be in the ordinary. The court below dismissed the bill. On appeal, the Supreme Court reversed, Stewart, J., saying that under the provisions of the Act of April 26, 1855,³ providing that a majority of the male members, etc., of any religious society might choose a person who should hold the title of their property, the plaintiffs were entitled to a decree in accordance with the prayer of the bill. The first paragraph of the syllabus, which reads that a conveyance of real estate to a trustee for the use of a particular congregation constitutes an executed legal estate in the congregation itself, is, of course, inconsistent with the facts of the case, and with the opinion of Stewart, J., in the Supreme Court. The learned judge distinctly said that there was a trust with the equitable title outstanding in the church. The reporter evidently copied this language from the quotation from the opinion of another case,⁴ without observing that that part of the sentence quoted had no application to the case in hand. If the statute of uses applied, there would be no necessity or possibility of a conveyance,⁵ as the legal title would then be in the church. Since the society was an unincorporated charitable society, it could probably take the legal title.⁶

¹¹ See pp. 303, 304.

¹ See p. 312.

² 221 Pa. 213 (1908).

³ P. L. 328, §7; see p. 483, n. 10.

⁴ On p. 221.

⁵ See pp. 83, 86.

⁶ See p. 79, on the application of the statute to a charitable use and p. 438 on gifts at law to unincorporated associations.

Marsh v. Platt

802. In *Marsh v. Platt*,⁷ the testator directed that his executors should hold the title to certain real estate, his son William to have the use and income, and to pay \$200 a year rent for the use thereof to testator's wife; after her death, the son to pay all taxes and assessments against the land, and upon his death the land to descend to and the title to vest in his heirs at law. The testator further provided that if the executors could obtain a certain price, and they considered it advisable, they were to sell, provided the son consented. The duties given the trustees were not active, the statute of uses applied,⁸ the son had a legal life estate, which was in a position to unite with the legal remainders, and under the rule in *Shelly's* case, the son took a fee. The court, however, in a *per curiam* opinion, approached the subject from a rather unusual point of view. They said that the limitation was within the express language of the rule in *Shelly's* case, and that the only question that arose was whether the conditions and the trust took the devise out of the rule. They then concluded that the duties were not active, and that the executor was the mere holder of the title on a dry trust.⁹ It is submitted that this is putting the cart before the horse. It was not a question whether the trust took the case out of the rule in *Shelly's* case, but whether the trust was so far executed that the case was ripe for the application of the rule. This case can only be sustained on the theory that no conveyance is necessary when the statute applies.¹⁰

Dallett v. Taggart

803. In *Dallett v. Taggart*,¹ the cestui que trust of a sole and separate use, in which no express power to will was conferred, made a will during coverture. It was held in an action of ejectment after her death, she having survived her husband, that the will had no effect on the property held under the sole and separate use. It was argued that the Act of June 4th, 1879,² providing that a will should take effect as of the

⁷ 221 Pa. 431 (1908).

⁸ See p. 82.

⁹ If the executor held the title, the rule would not apply, as the son would then have the equitable title, which

could not unite with the legal remainders.

¹⁰ See pp. 83, et seq.

¹ 223 Pa. 180 (1909).

² P. L. 88.

date of death, enabled her to dispose of her sole and separate use estate, because, at the time she died she was capable of making a will, the sole and separate use having then ceased, the will which she made during coverture becoming then valid. As was well said by Stewart, J., "The question raised we regard as definitely settled in the case of Neale's Appeal, 104 Pa. 214." The case is perfectly clear, does not seem to call for any discussion, and is logically in accord with the result reached in Neale's Appeal. The objections to the reasoning in that case have already been pointed out.³

Morgan's Estate, No. 1

804. In Morgan's Estate, No. 1,⁴ there was a gift by will in trust for M. for three years, and at the expiration of the term to such persons as M. should by any writing under seal appoint, and if he failed to so appoint, then in trust for M. for life with power of appointment by will and limitation over in default of appointment. M. was dead testate, and it is probable, although the report sheds no light on the fact, that the term of three years had not expired. There was also a clause in the will providing that the estate should not be liable for the debts or engagements of the cestui que trust. The account of the executor was filed, and at the audit a creditor of M. intervened, claiming apparently that M. took an absolute estate under the will. The report is obscure, and does not disclose how the creditor came in in the court below. Mr. Justice Stewart, in the Supreme Court, came to the conclusion that the creditor had a right to recover, and reversed the decree of the court below, which made a distribution apparently to the contrary. There was a general power of appointment under which M. could give himself the absolute interest, and as the court would compel the exercise of that power at the instance of the creditor, the law would consider that as done which ought to be done, and direct an immediate distribution to the creditor.⁵ Curiously enough, however, the learned judge, in

³ See p. 348, n. 7.

⁴ 223 Pa. 228 (1909).

⁵ If, however, the term had expired, the opportunity to exercise the power was gone, and M. had a life estate with limitations over in default of appointment by will. How, then, could the

creditor recover out of anything but income. Confer in this connection the discussion of the application of the rule against perpetuities to limitations under a general power of appointment, pp. 239 and 240.

another appeal in the same case on another branch,⁶ said that the appointees under the will of M. took as his legatees and devisees, and not as appointees, because he had an absolute estate. While the court would proceed upon the maxim of equity above referred to, so far as the creditor was concerned, in order to avoid the necessity of a decree directing an exercise of the power, there was no necessity for a resort to the fiction so far as the appointees under the will were concerned, and it is submitted, therefore, that on principle, so far as they were concerned, M. did not have an absolute estate, but they took as appointees from him under the special power. This case clearly proceeds upon the theory that a prohibition of involuntary alienation attached to a gift of an absolute estate is void, and to this extent ignores so much of the decisions which have been previously noticed⁷ as tend to sustain the validity of the clause in such case.

McCaffrey v. Gibney

805. In *McCaffrey v. Gibney*,⁸ the court took jurisdiction to direct a new sale for the purpose of barring contingent remainders and executory devises, when it appeared that the first sale under the Act of 1853 had not been conducted so that it would accomplish that purpose. This case seems to further strengthen the conclusion that an ordinary Pennsylvania deed does not destroy contingent remainders.⁹

Weinmann's Estate

806. In *Weinmann's Estate*,¹⁰ the testatrix gave a certain sum in trust to accumulate the income and add the same to the principal until a grandson, B., reached the age of forty years, when he was to be paid the income of the principal and the income of the accumulation for his life, and after his death the principal and accumulated income to go to his children then living, and if not, to fall into the residuary estate. The direction to accumulate clearly violated the Act of April 18, 1853,¹ and as it was a direction to accumulate the income of a specific bequest, it is clear that the income was properly

⁶ *Morgan's Estate*, No. 2, 223 Pa. 233 (1909).

⁷ See pp. 127, 136, 142, 143.

⁸ 223 Pa. 368 (1909).

⁹ See pp. 35, 36, n. 9.

¹⁰ 223 Pa. 508 (1909).

¹ P. L. 503, §9, see p. 389.

distributed to the residuary legatee of the testatrix.² There was a contingent gift of the accumulated fund, and the direction being struck out, the gift was not accelerated.³

Ferguson's Estate

807. In *Ferguson's Estate*,⁴ the testator gave the residue of his estate in trust to pay the income to his two daughters, each to receive a certain fixed annual sum, and any deficiency in the amount of the sum in one year to be made up out of the surplus of the subsequent year's income.⁵ There was a direction that the surplus income, if any, was to be paid to certain charities. There is an obscurity in the report as to the wording of the will on this point, and it cannot be told whether there was a gift to the charities of surplus income, if any, in all events, or whether there was only the gift of the surplus income arising if a daughter should die without issue. The learned judge who delivered the opinion in the court below apparently thought it was the latter. An account⁶ being before the court, and the daughters being living, it appeared that there was some surplus income which was claimed by the charities. The claim of the charities was dismissed in the court below, which, on appeal, was affirmed in the Supreme Court. The reasoning of the court is difficult to sustain.⁷ Penrose, J., in the court below, whose opinion was affirmed on appeal by the Supreme Court, said that the gifts to the charities were only by way of remainder, subject to be divested in part by the exercise of a power of appointment, and that such gifts were not accelerated, even by an express illegal direction to accumulate. As, however, there was no direction whatever to accumulate for the benefit of the charity, but merely a gift to the charity of the surplus income, if any, a gift which clearly prevented an accumulation, the relevancy of this reasoning is

² See p. 422.

³ See p. 424.

⁴ 223 Pa. 530 (1909).

⁵ There was also a direction to pay back to principal, out of income, payments for municipal claims, etc., a direction clearly involving an accumulation; see pp. 393, 394. No question as to this was before the court.

⁶ Probably of the trustees, although

the report does not state whether it was or not.

⁷ There was also a direction to hold surplus income upon certain events, as part of the principal of the residuary estate for the benefit of certain grandchildren. As, however, the event upon which that was to take effect had not happened, there was no direction to accumulate whatever before the court.

difficult to understand. The court directed the surplus income to be paid to the daughters; as however, the interest of the daughters in the estate was limited to a specific sum, it is difficult to see how they could receive any more as beneficiaries under the will. Of course, if they were the only heirs at law of the testator, their right might be sustained on this theory. There was a gift of certain annuities, and no disposition of the balance of the income, and as the income was of the residue, and the gift over of the residue was contingent, there was no one to whom income was presently payable, therefore, there was a resulting trust to the heirs at law or next of kin, according to the nature of the property. This, however, is a construction leaving part of the property undisposed of by the will, when there seems to be a clear and expressed gift of that surplus to certain specific beneficiaries, a provision which was no doubt inserted by the testator to cover this very contingency. The learned judge further said⁸ that the testator probably underestimated the income of his estate, and supposed that it would not at any time largely exceed the sum necessary to pay the annuities, and that he wished to protect the daughters from their own improvidence by limiting the amount to be paid each year to each of them. It is submitted, however, that this is an entirely unwarranted inference. It is just as reasonable to suppose that the testator contemplated a large surplus as a gift to the charities as that he contemplated the daughters should have most of the income. There is no ground to suppose that he limited the income to them to protect them from their own improvidence; it is just as reasonable to suppose that he wished them to have a certain fixed sum which would be sufficient to maintain them in the style of living to which they had been accustomed, and in order that they should always be sure of that specific sum, and would know just how much they would have to spend in each year, that he made the provision which he did.

Walters's Estate

808. In *Walters's Estate*,⁹ the testator gave the residue of his estate in trust to pay the income to a son for life, with a gift over of the principal, and inserted a clause that the interest of the son should be inalienable, etc., and that the trustees

⁸ On p. 534.

⁹ 223 Pa. 598 (1909).

should have discretion as to how much of the income they should pay the son. The son died, and it appeared at the audit of the account of the trustees that there was a large amount of accumulated income on hand which had not been paid to the son. It was held that this accumulated income should be paid to his administrator, and not to the next of kin of the testator, notwithstanding the clause against alienation.¹⁰ As no application was made by the cestui que trust in his lifetime to have the accumulations paid over, no question as to the application of the statute was before the court.

Cassidy's Estate

809. In Cassidy's Estate¹ there was a gift by will which the court below, in an opinion by Anderson, J., which was affirmed on appeal by the Supreme Court, construed in the following language, "We have therefore * * * an absolute gift modified by a trust for the wife's protection, with power in her of disposal by will," which the learned judge said did not reduce the absolute gift to a life estate. The case arose after the death of the wife in a controversy over the distribution of the estate, and no question was therefore raised as to how far she could have terminated the trust, had she proceeded in her lifetime.² It may be inferred from the language of the learned judge, that she could not, in his opinion, have so terminated it, and if that is his opinion, it is probably in conformity with the decisions which have been previously noted.³ If a trust of an absolute interest is valid, as against the cestui que trust, during the lifetime of the first taker, this case illustrates the proposition that the trust terminates upon his death, and the legal title is then to be conveyed to the persons entitled to his estate.

Kutz v. Nolan

810. In Kutz v. Nolan⁴ a young woman executed a deed of trust of all her property, reserving to herself an estate for years, with a power of appointment by will, and with limita-

¹⁰ See pp. 169, 170, where the case was cited from the advance reports, on this point.

¹ 224 Pa. 199 (1909).

² See p. 202.

³ See pp. 303, 304, 312, for a discussion of the validity of a trust of an absolute interest.

⁴ 224 Pa. 262 (1909).

tion over if she should die intestate during the term. The deed also contained a clause providing that the estate should not be liable in any way to the control or debts, etc., of the cestui que trust. The young woman confessed judgment for \$2,000, the term not having expired upon which execution was issued, and the trustee summoned as garnishee. The garnishee, in its answer, set up that the judgment was collusive, and confessed with the intent to defeat the trust, and that the judgment was prematurely issued. A rule for judgment against the garnishee was made absolute in the court below, which on appeal to the Supreme Court, was reversed. Mestrezat, J., in the Supreme Court, proceeded principally upon the ground that the attachment was prematurely issued, and that the waiver of that irregularity by the cestui que trust was null and void. If the judgment was, as was set up, not a real judgment but was intended as a substitute for a bill to declare the trust at an end and have the title reconveyed, there was no question as to involuntary alienation before the court. If the judgment was not collusive, the creditor could have recovered, as the clause prohibiting an involuntary alienation is void when imposed by the settlor on the interest reserved to himself.⁵ The waiving of the irregularity, however, partook of the nature of voluntary alienation. No case has been found deciding whether the clause against voluntary alienation is valid when imposed by the settlor upon interest reserved to himself. A like limitation upon a gift from a third person is probably void.⁶ In the case under discussion, the principle is somewhat different. If a man is so weak that he cannot take care of his property himself, there seems to be no reason why he should not put himself in tutelage for the rest of his life or for any prescribed period, and incapacitate himself from dealing with his own property. The learned judge also said⁷ that the trust was valid and enforceable against every person except a bona fide creditor of the cestui que trust. The trust was valid as against the creditor; the only thing invalid against him was the clause against involuntary alienation attached to the term, and the gift over of the principal was also valid as against him, unless he was a creditor entitled to proceed under the statutes against fraudulent conveyances.

⁵ See p. 163, confer p. 162.

⁷ On p. 264.

⁶ See pp. 110, 130, 142, 175.

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¹ Although the term spendthrift has been avoided whenever possible, it is retained in the index in deference to established usage.

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